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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-306

AMERICAN MOTORS CORPORATION, CHARLES DALGLEISH CADILLAC, INC., CHARNOCK OLDS, INC., CHRYSLER CORPORATION AND GENERAL MOTORS CORPORATION,
Petitioners,

v.

FEDERAL TRADE COMMISSION, MICHAEL PERTSCHUK, Chairman, DAVID A. CLANTON, Commissioner, PAUL RAND DIXON, Commissioner, and ROBERT PITOFSKY, Commissioner,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners American Motors Corporation, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 2, 1979.

OPINIONS BELOW

The opinion of the court of appeals, not yet officially reported, is found at 1979-2 CCH Trade Cas. ¶62,741 and is reprinted as Appendix A to this petition. The orders of the district court reviewed by the court of appeals are also unreported and are reprinted as Appendices B and C to this petition.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The district court exercised its discretionary jurisdiction under the Declaratory Judgment Act to hear petitioners' substantial claims of ongoing violations of their Fourth and Fifth Amendment rights by the respondent Federal Trade Commission. The violations alleged concern the Commission's formal adoption and pervasive exercise of investigatory powers prohibited by the Constitution and proscribed by that agency's own statutes and regulations. In denying the agency's motion to dismiss, the district court determined that no direct remedy for these violations was otherwise available to petitioners and that pursuit of indirect means for judicial review of the agency's misconduct hinged on an administrative procedure that was both futile and prejudicial to petitioners' rights.

Accepting an interlocutory appeal by the FTC, the court of appeals reversed and directed that the complaint be dismissed. The appellate court held that petitioners

could not obtain relief under the Declaratory Judgment Act and federal equity jurisdiction from continuing unconstitutional practices of the agency.

The availability of prompt judicial review under the circumstances here presented is a question of exceptional importance, not only to petitioners but to the lawful functioning of the Federal Trade Commission in many other investigations and proceedings. Other courts of appeals have held that the Declaratory Judgment Act is appropriately invoked to review unlawful exercises of power by federal agencies. Here, however, the court of appeals has foreclosed such review as a matter of law.

The following questions are presented for review:

1. Must federal courts withhold their jurisdiction to hear substantial constitutional claims under the Declaratory Judgment Act, and defer to inadequate agency procedures, when the agency has already officially adopted and categorically refused to correct an ongoing practice that gives rise to petitioners' claims and directly impacts on petitioners' rights?

2. Is the exercise of federal court jurisdiction under the Declaratory Judgment Act to adjudicate a continuing unconstitutional agency practice precluded as a matter of law by the existence of a non-exclusive statutory procedure established for the limited purpose of enforcing specific FTC subpoenas?

STATUTES INVOLVED

The statutory provisions involved are Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and

Section 10 of the Administrative Procedure Act, 5 U.S.C. § 703. They are reprinted in Appendix D to this petition.

STATEMENT OF THE CASE

For many years, the FTC conducted its official activities, including its compulsory investigations, in accordance with the requirement that it provide reasonable notice of the purpose and scope of its formal investigations. This requirement is derived from the Court's express holding in its *American Tobacco* decision that the FTC is prohibited from exercising investigatory powers merely to search industry records for any possible violation of the laws it enforces.[1] Such excursions into private records and affairs constitute general search warrants that impermissibly frustrate judicial review of their lawfulness and their relevance to the agency's official duties.

Following the *American Tobacco* decision, the FTC adopted official Rules of Practice formalizing the requirement that it provide reasonable notice of the purpose and scope of its investigations.[2] In 1954, the Commission's own

[1] *Federal Trade Comm.* v. *American Tobacco Co.*, 264 U.S. 298, 306 (1924) ("It is contrary to the first principles of justice to allow a search through all the [companies'] records, relevant and irrelevant, in the hope that something will turn up").

[2] Section 2.6 of the FTC Rules provides:

> "*Notification of Purpose.* Any person under investigation compelled or requested to furnish information or documentary evidence shall be advised with respect to the purpose and scope of the investigation." 16 C.F.R. § 2.6 (1979).

The Federal Trade Commission Act itself limits the agency's power to issue compulsory process to the procurement of evidence relating to "any matter under investigation." 15 U.S.C. §49. The matter under investigation must be identified with reasonable specificity.

General Counsel specifically concluded that the lawful exercise of the FTC's investigatory powers was conditional on its obligation to provide the persons under investigation with a clear statement of the investigation's purpose and scope:

> "In the use of any compulsory process, the Commission must have a lawful purpose, and that purpose must be communicated to the party investigated . . . .
>
> "The purposes of the investigation must be clearly expressed. The scope of the investigation will be judged by the courts in the light of the expressed purposes."[3]

This requirement was carried forward in the FTC's official Operating Manual.[4]

[3] FTC Staff Report on Investigatory Powers of the Federal Trade Commission, at 121 (Feb. 11, 1954).

[4] *See* FTC Release No. OM 3-40, *amending* FTC Operating Manual §3.7(B) (April 22, 1974). The Commission acknowledged that its compulsory powers could be exercised only pursuant to an official Resolution, approved by formal vote of the Commissioners, *id.* §3.7(A), which adequately set forth the nature and scope of the investigation:

> "The body of the resolution must adequately set forth the 'Nature and Scope of Investigation'. A mere citation of the statute (e.g., Section 5, Federal Trade Commission Act) *does not* constitute an adequate statement of the nature and scope of the investigation. The statement may be brief but must be specific to enable a court to determine whether: (a) the investigation is within the authority of the Commission; (b) the material demanded is relevant to the investigation; and (c) the material demanded is reasonable in scope. . . .The statement should also include the charges, the products and geographic area involved." (*Id.* §3.7(B)(2); emphasis supplied).

By a recent amendment to its Manual, discussed below in the text, the Commission excised these requirements in disregard of *American Tobacco* and its own rules.

The Unlawful Agency Practice

The FTC observed these notice requirements of the Constitution and of its own statutes and rules until 1976. On August 2d of that year, however, the Commissioners formally commenced an investigation of the domestic automobile industry, which the FTC characterizes as "omnibus." The official authorizing Resolution, approved by the Commission, does not provide the requisite notice of investigative purpose and sets no meaningful restrictions on the investigation's scope.

The omnibus Resolution encompasses literally *all* "acts, practices and methods of competition," to determine their "effects" on the automobile industry and whether *any* statute administered by the Commission may have been violated.[5] It directs the FTC staff to conduct a continuing, unlimited general search for any possible law violation that may come within the FTC's purview.[6]

In first responding to the investigation, petitioners sought to obtain the FTC's cooperation to establish meaningful limitations on its investigation and to provide the

[5] The full omnibus Resolution is reprinted as Appendix E. Its operative paragraph states:

> "To investigate the acts, practices and methods of competition of General Motors Corporation, Ford Motor Company, Chrysler Corporation and other firms engaged in the production, sale, and distribution of automobiles to determine the effects thereof on the structure, conduct and performance of the automobile industry and whether such acts, practices and methods of competition may have violated or are violating the Federal Trade Commission Act or other statutes administered by the Commission." (App. 37a).

[6] Significantly, the omnibus automobile Resolution is even broader in its declared sweep than the FTC resolution condemned by the Court in *American Tobacco*, which only concerned §5 of the FTC Act. The omnibus automobile Resolution comprehends possible acts or practices in violation of *any* of the FTC's myriad statutes.

requisite notice of its purpose and scope. Petitioners permitted preliminary background depositions to be taken of numerous employees. Lengthy negotiations were also conducted with the FTC staff. All efforts proved futile.[7] Moreover, even as petitioners sought the FTC's cooperation, a series of disturbing events and revelations occurred which made the FTC's exercise of omnibus investigative power even more ominous and threatening to petitioners' rights.

1. On April 27, 1978, a closed, non-public meeting was held between the FTC Commissioners and the staff conducting the omnibus investigation. At this meeting, the Commission reviewed with the staff the status and direction of approximately 70 agency proceedings and investigations relating to the automobile industry.[8] Most of these proceedings have never been disclosed publicly, but those which have been disclosed invariably fall within the comprehensive sweep of the omnibus Resolution. Although the Commission reviewed the omnibus in-

[7] As reflected by their initial effort of cooperation, petitioners do *not* assert that the automobile industry may not be investigated for a proper purpose within an agency's authority. The industry presently, and in the past, has been the subject of many overlapping and costly governmental investigations and proceedings, including some before the FTC. Here, petitioners challenge the FTC's adoption and pursuit of an unconstitutional course of conduct as a matter of official agency practice, in this and other proceedings, which precludes those being investigated from knowing whether the agency's powers are being exercised for lawful purposes and denies petitioners and others due process which should be present throughout the agency's activities. This course of conduct also precludes the courts from knowing whether the agency's powers are being lawfully exercised.

[8] Official Transcript of Proceedings before the Federal Trade Commission, April 27, 1978, at 11 (released in expurgated form pursuant to the Freedom of Information Act).

vestigation in conjunction with these other proceedings, it has refused to release major portions of the transcript bearing on the relationship of the omnibus investigation to the other proceedings.[9]

2. It has also been revealed that the FTC's exercise of omnibus investigatory power is intended to serve *other* agencies in pending and future proceedings involving the automobile industry. Thus, in a written undertaking with the Department of Justice, apparently intended to encourage the Department's acquiescence in the FTC's investigative plans, the Commission promised to make a wholesale delivery to the Antitrust Division of *all* materials obtained through the exercise of omnibus investigatory power. (App. 39a-41a). The Antitrust Division would then have those materials available to it for any subsequent civil or criminal action it may wish to pursue. This arrangement circumvents restrictions on the Department's criminal investigative powers through grand jury process and its civil discovery powers as established and limited by the Antitrust Civil Process Act, 15 U.S.C. §§ 1311, *et seq.*[10]

3. On July 10, 1978, the FTC staff issued subpoenas *duces tecum* to the manufacturer petitioners covering a vast array of unrelated subjects over a thirty-four year

[9] The use of one investigation to obtain information for other undisclosed investigations is a violation of petitioners' rights under the agency's own rules. Similarly, the covert use of an investigation to obtain information for pending adjudicative proceedings is a violation of Commission rules.

[10] The Commission has admitted that it may make the materials collected in the omnibus investigation available to other federal agencies, state agencies and persons in the public and private sectors. However, it has not revealed the nature of such arrangements which may already exist.

period from 1946 through 1980. The subpoenas would require these petitioners to produce:

> "... copies of just about all of [their] records bearing on the production and sale of automobiles for the years running back to 1946 and, as far as forecasts are concerned, extending forward through at least the year 1980." (App. 2a).[11]

The FTC staff refused in negotiations to narrow the subpoenas in any significant respect. Rather, it declared that "*everything*" is relevant to its investigation and issued an ultimatum that petitioners concede the legality of the investigation and begin to comply immediately as a condition of negotiations over burden and confidentiality issues.

Petitioner Chrysler has concluded that, merely for it to make detailed estimates of burden for resisting the FTC's oppressive demands, it would have to spend several hundreds of thousands of dollars and divert needed personnel from their essential operating duties. American Motors faces a similar cash drain and manpower burden. Chrysler estimates that actual compliance with its subpoena would cost it over ten million dollars, while American Motors' preliminary research places its projected cost of compliance in the range also of several million dollars.[12]

[11] The subpoenas also require the manufacturers to produce confidential, proprietary information of their independent franchised dealers, including the dealer petitioners Charles Dalgleish Cadillac Charnock Olds. No notice of these subpoenas was given by the FTC to those dealers.

[12] The FTC increasingly requires detailed and exact estimates of burden in considering requests for relief from specific subpoenas and, even then, invariably discounts such estimates as "self-serving." The costs incurred by petitioners merely to estimate their burden of compliance are verified by affidavits of

(footnote continues)

4. Without notice to petitioners, the FTC staff also issued demands to third parties under the aegis of its omnibus investigation for confidential records and information of petitioners. Notably, highly confidential and proprietary information of American Motors was subpoenaed from the Chase Manhattan Bank, from which major capital financing had been obtained, without notice to American Motors. Commission rules provide neither for notice to persons whose records may be subpoenaed from third parties, nor for a right of intervention to challenge their seizure.[13]

5. In a move making "omnibus" industry-wide resolutions standard FTC operating procedure, the Commission in August, 1978, issued a disturbing official directive to its staff personnel encouraging them to issue compulsory process under the authority of omnibus resolutions, even though the materials were being sought for other specific proceedings, whether previously initiated or planned for the future:

> "Where an omnibus resolution has been approved authorizing the use of compulsory procedures to investigate the practices of members of an industry, that resolution *may be used as authority for issuance of investigational subpoenas against proposed respondents in previously or subsequently initiated investigations which come within the scope of the investigation authorized by*

(footnote continued)

Chrysler, American Motors and General Motors employees. General Motors spent more than $700,000 to make a detailed analysis of the burden of complying with its subpoena. GM's potential cost of compliance is conservatively estimated at more than $110,000,000 and 700,000 manhours of personnel time.

[13] American Motors learned of the Chase Manhattan subpoena, calling for AMC records and plans, from a source other than the FTC just before Chase Manhattan was intending to produce the subpoenaed information.

> *the resolution....* The omnibus 7-digit number should be used as the formal file number *only* for the service of the subpoena or compulsory process."[14] (Emphasis supplied).

By conscious policy of the Commission itself, omnibus investigatory resolutions have been adopted as a device to mask the agency's true purposes in exercising its investigatory powers. Those purposes are thus withheld from the persons subpoenaed *and* from the courts. Judicial control over the agency's exercise of power is thereby subverted by supplying a fictitious talisman in the form of an omnibus resolution which, because of its all-encompassing breadth, necessarily subsumes any and all agency demands relating to an industry.[15]

The omnibus automobile Resolution, as well as other omnibus resolutions, deviate sharply from constitutional precedent and from the Commission's own rules. The FTC's exercise of omnibus investigatory power is neither an isolated instance nor an aberration attributable to excessive staff zeal. Rather, the challenged practice constitutes the FTC's officially adopted and encouraged course of conduct, which now permeates the agency's proceedings and is part of its day-to-day exercise of power. Because of the direct impact of this practice on petitioners and the

[14] FTC Operating Manual § 3.3.6.7.4.2, at 32 (Aug. 1978). The omnibus automobile investigation is assigned a "7-digit number," which is FTC File No. 761-0083.

[15] Agency subpoenas and other compulsory process must be reviewed by the federal courts for relevance and reasonableness in relation to a specific, lawful purpose. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209 (1946). Just as the agency's failure to state a purpose defeats judicial review of its compulsory process, the agency's masking of its real purposes makes judicial review an ineffectual and futile gesture. *See, e.g., Civil Aeronautics Board* v. *United Airlines, Inc.*, 542 F.2d 394, 402-03 (7th Cir. 1976); *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F.2d 147, 155 (D.C. Cir. 1961).

substantial constitutional issues involved, petitioners sought to avail themselves of the historic function of the federal courts to guard against improper uses of governmental power.

The District Court Proceedings

Petitioners sued the FTC for declaratory and injunctive relief in the Eastern District of Michigan on September 11, 1978. The complaint, in three counts, charged that the exercise of omnibus investigatory powers is unauthorized by statute, violative of Fourth Amendment rights in failing to define the investigation's purpose and scope, and violative of Fifth Amendment rights in disregarding the clear notice requirements of the agency's own statutes and regulations.

The Commission moved to dismiss the complaint. In briefing and arguing its motion, the FTC made a number of concessions confirming that its departure from this Court's precedents was intentional and would not be rectified voluntarily.

1. The FTC announced that it no longer regarded the Court's holding in *Federal Trade Comm.* v. *American Tobacco Co., supra*, as binding on the Commission. The FTC claimed, *in haec verba*, that the Court's decision in *United States* v. *Morton Salt Co.*, 388 U.S. 632 (1950), had "...'obliterated' the 'first principles of justice' of *American Tobacco*" and had eliminated the restraint on general warrant investigations by the FTC.[16]

[16] Reply Memorandum [of FTC] in Support of Defendants' Motion to Dismiss or Transfer, at 6, *American Motors Corp.* v. *Federal Trade Comm.*, Civil Action No. 8-72335 (E.D. Mich., filed Oct. 24, 1978). Four years after *Morton Salt*, however, the FTC General Counsel's report on the limits of FTC investigatory

(footnote continues)

2. The FTC declared that its omnibus investigation is as broad in scope and subject matter as all of the various statutes which it enforces,[17] and further admitted that the Commission "...doesn't necessarily know what violation of law it's looking for. It's engaged, if you will, in a fishing expedition ...."[18] The FTC conceded that its omnibus investigation was *not* directed at "any specific violation known or suspected to exist."[19]

3. The FTC insisted that its "investigative functions," including its omnibus Resolution and ongoing investigative activities, were "so committed to agency discretion as to be unreviewable [by the courts]."[20]

(footnote continued)

power concluded that *American Tobacco* "...remains the leading case against arbitrary and unreasonable demands." FTC Staff Report, *supra*, at 5. The report further observed:

> "...[*American Tobacco*] remains as a prohibition of reasonable search, having been cited with approval on this score, in both the *Oklahoma Press* and *Morton Salt* decisions." (*Id.* at 58).

This conclusion is correct. The Court has expressly preserved its holding in *American Tobacco* as a restraint on unconstitutional assertions of search power by the FTC and other agencies. *United States* v. *Morton Salt Co., supra*, 338 U.S. at 652; *Oklahoma Press Publishing Co.* v. *Walling, supra*, 327 U.S. at 207; *see also Civil Aeronautics Board* v. *United Airlines, Inc., supra*, 542 F.2d at 398-99.

[17] Transcript of Proceedings, Oct. 30, 1978, at 15-16.

[18] Transcript of Proceedings, Dec. 11, 1978, at 49.

[19] FTC Statement to the Hon. Thomas F. Eagleton, typewritten mem. at 6, Hearings on Appropriations for Depts. of State, Justice, and Commerce, the Judiciary, and Related Agencies before a Subcomm. of Senate Comm. on Approp., 96th Cong., 1st Sess. (May 1979).

[20] Memorandum [of FTC] in Support of Defendants' Motion to Dismiss or Transfer, at 17-18, 18 n. 22, *American Motors Corp.* v. *Federal Trade Comm.*, Civil Action No. 8-72335 (E.D. Mich., filed Oct. 3, 1978). The Commission's recent amendment to its Operating Manual insures, as a practical matter, that there will be no meaningful judicial review of the agency's exercise of investigative power, since the real purpose of specific investigative demands will not be revealed.

4. The FTC admitted that it had purposely withheld notice to American Motors of the subpoena for AMC records to the Chase Manhattan Bank.[21] It declared that it would withhold notice from petitioners in the future as to third-party subpoenas for petitioners' records and, if petitioners otherwise learned of such subpoenas, it would oppose their intervention before the agency or in court.[22]

The district court denied the FTC's motion to dismiss on November 15, 1978. (App. 22a-29a). The court found subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337, and proper venue under 28 U.S.C. § 1391(e). In addition, the court ruled that it should exercise its discretionary jurisdiction under the Declaratory Judgment Act because (1) the complaint raised legal questions involving "a substantial constitutional deprivation" and presented no questions within the agency's fact-finding expertise; (2) the constitutional questions presented were "particularly within the expertise of the courts"; (3) the FTC's ongoing practices threatened irreparable harm to petitioners' rights; and (4) administrative and statutory procedures for reviewing specific subpoenas did not afford petitioners a direct or adequate remedy for their constitutional claims challenging ongoing agency misconduct.

The district court's finding that administration procedures were inadequate was borne out by a later official FTC ruling on motions filed by another target of the omnibus investigation. Denying these motions, the Commissioners again endorsed their omnibus Resolution despite its failure to provide the requisite notice of

[21] FTC Answer to Complaint, ¶ 28.

[22] FTC Answer to Complaint ¶ 32; Reply Memorandum [of FTC] in Support of Defendants' Motion to Dismiss or Transfer, *supra*, at 15.

investigative purpose and scope.[23] The Commission refused to allow access to the briefs of Commission staff filed in opposition to these motions or to hear argument on them. Moreover, its rulings on issues concerning specific subpoena demands reflect its view that *all* subjects of potential inquiry were comprehended by the omnibus Resolution. Any consideration of relevancy was thus reduced to a tautological recitation by the FTC of the all-encompassing sweep of its investigation, rather than the required comparison of its demands to a statement of actual investigative purpose.

On December 13, 1978, the district court scheduled the case for expedited resolution through summary judgment motions and directed that petitioners be protected from threatened assertions by the FTC of waiver of petitioners' subpoena objections if they proceeded to obtain a threshold constitutional ruling on the agency's conduct. (App. 30a-32a). Treating the district court's pretrial management order as a preliminary injunction, the Commission filed an interlocutory appeal seeking reversal of the district court's discretionary exercise of jurisdiction over the complaint pursuant to the Declaratory Judgment Act.

The Court of Appeals Decision

On July 2, 1979, the court of appeals reversed the district court's denial of the motion to dismiss and ordered the complaint dismissed. (App. 1a-21a). The appellate court observed that petitioners' "[i]nteresting and challenging" constitutional claims deserved serious judicial consideration, especially in light of Supreme Court precedents limiting and defining FTC investigatory

[23] Decision of the Federal Trade Commission on Motion to Quash Subpoena Duces Tecum Issued to Ford Motor Company, and on Certain Other Motions and Requests (March 5, 1979).

power. (App. 2a, 11a). Nevertheless, the court felt itself constrained as a matter of law to deny petitioners a direct and prompt adjudication of the legality of the agency's conduct.[24]

The court of appeals specifically held that the federal courts may not consider petitioners' constitutional challenge to the ongoing exercise of unlawful agency power, despite the agency's official adoption of the challenged practice and prior refusals to rectify it, until petitioners had formally requested reconsideration of the question in the context of motions to quash specific subpoenas.[25] The court went on to hold that no judicial review could be

[24] The court entertained the interlocutory appeal over petitioners' objection that appellate jurisdiction was lacking over both the order denying the motion to dismiss and the pretrial management order under the Court's decisions in *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978), and *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966). The decision denying the motion to dismiss was considered a nonappealable order, but the court below treated the pretrial management order as having the effect of a preliminary injunction under 28 U.S.C. § 1292(a)(1). The issue of appellate jurisdiction also could be reached by the Court if *certiorari* is granted.

[25] FTC Rules provide no procedure for directly challenging an unlawful Resolution or investigatory practice. They do, however, require that all objections to a subpoena be stated in a single motion, which means that detailed objections to the relevance and burden of particular specifications must be made. 16 C.F.R. § 2.7 (1979). In the absence of any notice of the investigation's scope or purpose, such objections cannot be intelligently formed and the function of a motion to quash, even in addressing the merits of specific subpoenas, is vitiated. The court of appeals did not address this point, nor the specific ruling by the FTC rejecting Ford's challenge to the same omnibus Resolution, nor the FTC's assertions in the district court that *American Tobacco* has been "obliterated" and that the FTC's exercise of investigative discretion is unreviewable.

obtained, even after those motions were denied by the Commission, except as a defense to the FTC's attempted enforcement of specific subpoenas when and as it chooses to initiate judicial proceedings. In reaching these holdings, the court concluded that neither the nature of the claims asserted nor the impact on petitioners' rights, actual and threatened, permitted it to sustain the district court's exercise of jurisdiction.

On August 9, 1979, the court of appeals stayed its mandate to permit the filing of this petition for a writ of certiorari and an application for a continuation of its stay by this Court, or a Justice thereof.

REASONS FOR GRANTING THE WRIT

The decision below raises important constitutional and jurisdictional issues that merit review and resolution by the Court. The court of appeals' holding seriously curtails federal court jurisdiction under the Declaratory Judgment Act to hear substantial challenges to federal agency misconduct and to halt the unconstitutional exercise of official power. In concluding that the district court was precluded from entertaining petitioners' complaint, despite that court's findings that procedural recourse before the agency was inadequate and ineffective, the court of appeals has misread the decisions of this Court and reached a result that conflicts sharply in its holding and in principle with decisions from other circuits.

On the issues of federal jurisdiction presented by this case turn the timely vindication of constitutional rights and the lawful operation and conduct of a principal federal agency.

I.

FEDERAL COURTS SHOULD BE PERMITTED, IN THEIR DISCRETION, TO HEAR SUBSTANTIAL CHALLENGES TO UNCONSTITUTIONAL AGENCY PRACTICES EVEN THOUGH AN ADMINISTRATIVE PROCEDURE, FOUND TO BE INADEQUATE AND INAPPROPRIATE, HAS NOT BEEN EXHAUSTED.

As the district court determined and the court of appeals did not dispute, petitioners' complaint presents substantial constitutional questions that are ripe for adjudication and that do not involve any application of agency fact-finding or policy-making discretion. (App. 24a-26a). The Commission's practice of pursuing "omnibus" industry-wide investigations is actively encouraged by the FTC in its Operating Manual, regardless of the agency's actual, specific investigative purposes and needs. Petitioners are directly affected by the omnibus automobile investigation, which continues daily and involves the outlay of millions of dollars annually in public funds and substantial diversions of petitioners' resources. In its own official pronouncements and rulings, as well as before the district court, the FTC has stoutly refused to reconsider its use of omnibus resolutions.

Under these circumstances, the district court correctly determined that it was not required to withhold its jurisdiction in deference to agency motion procedures designed to contest particular subpoenas. However, relying on a misconstruction of *Federal Trade Comm.* v. *Claire Furnace Co.*, 274 U.S. 160 (1927), and completely ignoring the holding in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), the court of appeals required rigid adherence to the exhaustion principle, even though the FTC's unlawful conduct will continue unabated.

1. The Court held in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), that discretionary equitable jurisdiction is properly exercised before the exhaustion of administrative procedures when an agency is alleged to have acted in clear violation of a legal requirement or limitation:

> "Does the law, 'apart from the review provisions of the [National Labor Relations] Act,' afford a remedy? We think the answer surely must be yes. This suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the [NLRB] made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." (358 U.S. at 188).

Although the FTC here is acting in clear violation of limitations imposed by the Constitution and its own regulations, the court of appeals held that the law does not afford a remedy apart from the subpoena review procedures of the FTC Act. The *Leedom* principle, which the appellate court failed to discuss, was a major basis for the district court's exercise of jurisdiction. (App. 24a).

There is special reason why the exhaustion of administrative procedures should not be required in situations where clear legal requirements are being violated, or where the agency is acting outside of its lawful authority. The resolution of legal questions concerning an agency's conduct or practices does not involve factual or other determinations committed to the agency for initial decision. For example, the Second Circuit sustained a declaratory judgment action which challenged the EPA's jurisdiction to hear specific discharge applications affecting state water pollution control, despite continuing EPA proceedings subject to later statutory review in the court of appeals. The court found that the action presented legal

questions ripe for prompt judicial determination and directed the district court to "... 'interrupt' agency action on the ground that the agency is acting outside its statutory authority." *Central Hudson Gas & Electric Corp.* v. *U.S. Environmental Protection Agency*, 587 F.2d 549, 555 (2d Cir. 1978).[26]

The instant case falls within this important jurisdictional principle. Review is not sought of any matter committed to the FTC's expertise or discretion. Rather, the complaint seeks to enjoin practices which are in clear violation of constitutional precedents of this Court, as well as the FTC's official regulations. Constitutional claims such as these "lie within the expertise of courts, not the expertise of administrators" and require no exhaustion of administrative procedures. *Plano* v. *Baker*, 504 F.2d 595, 599 (2d Cir. 1974); *accord Califano* v. *Sanders*, 430 U.S. 99, 109 (1977) (dictum) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions"); *McGrath* v. *Weinberger*, 541 F.2d 249, 252-53 (10th Cir. 1976).

The court of appeals' decision extends the "exhaustion" requirement into an area of traditional federal court jurisdiction where that requirement has no rationale and, under decisions of this Court and other circuits, should have no application.

2. The Court held in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), that federal courts also are not

[26] Other circuits have held, in conflict with the court of appeals below, that questions of law not committed to agency discretion may be heard without requiring further resort to the agencies. *See Exxon Corp.* v. *Federal Trade Comm.*, 588 F.2d 895, 901-04 (3d Cir. 1978); *Mayor and City Council of Baltimore* v. *Mathews*, 562 F.2d 914, 920-21 (4th Cir. 1977); *Templeton* v. *Dixie Color Printing Co.*, 444 F.2d 1064, 1069 (5th Cir. 1971); *Elmo Division of Drive-X Co.* v. *Dixon*, 348 F.2d 342, 344 (D.C. Cir. 1965).

required to await pointless formalities of administrative procedure before an agency's official actions may be submitted to federal court review. The *Abbott* decision mandates a "pragmatic" and "flexible" approach in this regard.[27] 387 U.S. at 149-50.

Courts of appeals in other circuits hold that the failure to exhaust available administrative procedures is not a barrier to federal court review where further resort to the agency would plainly be futile. Determinations of futility in these situations have rested initially with the district court and have typically turned on clear expressions of agency position on the questions being presented. In *National Automatic Laundry & Cleaning Council* v. *Schultz*, 443 F.2d 689, 700-01 (D.C. Cir. 1971), the court held that statements of position by an agency or its head would be treated as "presumptively final," even when styled as an informal opinion. The exhaustion doctrine does not require importuning an agency to change a fixed course of action. Rather, immediate judicial review should be allowed when an agency's statements or conduct "... clearly indicates that [its] position with regard to [the matters in suit] is firmly rooted." *Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 696, 703 (D.C. Cir. 1974); *accord A.O. Smith Corp.* v. *Federal Trade Comm.*, 530 F.2d 515, 522 (3d Cir. 1976).[28]

[27] *See also Central Hudson Gas & Electric Corp.* v. *U.S. Environmental Protection Agency, supra*, 587 F.2d at 558-59; *Citizens Communications Center* v. *Federal Communications Comm.*, 447 F.2d 1201, 1205 (D.C. Cir. 1971); *Independent Broker-Dealer T. Assn.* v. *Securities & Exchange Comm.*, 442 F.2d 132, 142 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971).

[28] *See also Phillips Petroleum Co.* v. *Federal Energy Administration*, 435 F. Supp. 1238, 1248 (D. Del. 1977); *Shell Oil Co.* v. *Federal Energy Administration*, 400 F. Supp. 964, 968 (S.D. Tex.), *aff'd*, 527 F.2d 1243 (Emer. Ct. App. 1975); *Western International Hotels* v. *Tahoe Regional Planning Agency*, 387 F. Supp. 429, 433 (D. Nev. 1975), *modified on other grounds sub nom. Jacobson* v. *Tahoe Regional Planning Agency*, 558 F.2d 928 (9th Cir. 1977).

The FTC's position on "omnibus" investigations is firmly entrenched, as evidenced by its own rulings and statements. First, the Commissioners themselves voted formally to adopt the omnibus automobile industry Resolution. Second, in August, 1978, the Commission amended its Operating Manual to encourage the use of omnibus resolutions to mask the agency's actual investigative purposes. Third, in this action, the FTC has vigorously defended the propriety of its omnibus Resolution by asserting an unreviewable discretion, rejecting out of hand petitioners' constitutional claims as "plainly insubstantial,"[29] and proclaiming the interment of *American Tobacco*'s "first principles of justice." Finally, the FTC has unequivocally rejected the position that its omnibus automobile investigation is unconstitutional in denying a motion to quash filed by another target of the investigation.[30]

Where, as here, the agency has already rejected the essential challenge to its conduct raised by petitioners, there is "no real [administrative] remedy to exhaust." *Goetz* v. *Ansell*, 477 F.2d 636, 637 (2d Cir. 1973). Application of *Abbott*'s practical approach to exhaustion principles in this case should relieve petitioners from pursuing, and the district court from yielding to, a plainly futile administrative procedure.

3. The court of appeals incorrectly applied the Court's early decision in *Federal Trade Comm.* v. *Claire Furnace*

[29] Reply Memorandum [of FTC] in Support of Defendants' Motion to Dismiss or Transfer, *supra*, at 6.

[30] The court of appeals misconceived the FTC's purported narrowing of a subpoena served on Ford Motor Company as holding out the possibility that petitioners' constitutional challenge might be heard sympathetically by the Commission. (App. 20a). The Commission expressly rejected Ford's contention that the omnibus automobile Resolution is unconstitutional.

Co., 274 U.S. 160 (1927), which preceded the Declaratory Judgment Act by seven years, as "mandat[ing]" that petitioners exhaust administrative subpoena procedures. (App. 13a). The *Claire Furnace* decision, however, construed the FTC Act prior to the amendment of its enforcement procedures and merely held that, because the Attorney General had not yet reviewed the FTC's challenged action, the final position of the decision-making official was not yet known.[31] That case did not involve ongoing agency practices which violate constitutional commands and which the heads of the agency have refused to correct.

Perhaps because even the Commission did not rely on *Claire Furnace*, the court of appeals did not consider in its opinion the decisions of other circuits which have limited the effect of *Claire Furnace* in view of Congress' subsequent expansion of judicial declaratory and injunctive remedies under the Declaratory Judgment Act and the Administrative Procedure Act.[32] *Exxon Corp.* v. *Federal Trade Comm.*, 588 F.2d 895, 900-01 (3d Cir. 1978); *A.O. Smith Corp.* v. *Federal Trade Comm.*, 520 F.2d 515, 520 (3d Cir. 1976); *United States* v. *St. Regis Paper Co.*, 285 F.2d 607, 615-16 (2d Cir. 1960), *aff'd*, 368 U.S. 208 (1961); *see also Standard Oil Co.* v. *Federal Trade Comm.*, 596 F.2d 1381, 1384-87 (9th Cir. 1979).

[31] Since the FTC Act was amended, the Commission must no longer seek the Attorney General's concurrence and initiative to secure enforcement of FTC compulsory process. 15 U.S.C. § 49.

[32] This Court left the question unresolved in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950). The Court expressed its concern for the availability of declaratory and injunctive remedies against the FTC, but concluded that it was not required to reach the question "... whether the Declaratory Judgment Act, the Administrative Procedure Act, or general equitable power of the courts would afford a remedy if there were shown to be a wrong...." 338 U.S. at 654.

The extension of this Court's limited *Claire Furnace* holding to the present situation, where pervasive agency misconduct is being challenged, reflects neither the pragmatic approach required under *Abbott* nor the distinction drawn in *Leedom* v. *Kyne* between federal jurisdiction to decide alleged abuses of agency power and the limited judicial review of findings committed to the agency for initial determination. The Court is asked to clarify these precedents and to supply needed guidance as to the conditions under which the Declaratory Judgment Act may be invoked to secure timely and effective judicial redress from the unconstitutional exercise of agency power.

These issues are vital to the role of federal courts in protecting constitutional rights and to the proper functioning of federal agencies.

II.

UNCONSTITUTIONAL AGENCY PRACTICES SHOULD BE SUSCEPTIBLE TO PROMPT JUDICIAL CORRECTION UNDER THE DECLARATORY JUDGMENT ACT, REGARDLESS OF WHETHER SUCH CLAIMS MAY BE RAISED COLLATERALLY AS DEFENSES TO STATUTORY SUBPOENA ENFORCEMENT PROCEEDINGS.

The district court found that this action provided the only timely means by which petitioners could avert substantial prejudice to their rights and interests caused by the FTC's "omnibus" investigation. Discarding those findings, the court of appeals extended the exhaustion doctrine still further by holding that petitioners must be presumed to have an adequate remedy for raising their constitutional claims in subpoena enforcement proceedings brought under Section 9 of the FTC Act. Enlarging the holding in *Reisman* v. *Caplin*, 375 U.S. 440 (1964), the appellate court concluded that federal jurisdiction over

those claims, pursuant to the Declaratory Judgment Act, must be withheld as a matter of law.

This ruling severely restricts the district courts' ability to exercise their discretion to hear meritorious constitutional challenges to ongoing agency misconduct. It reflects a wooden application of exhaustion principles by requiring resort to non-exclusive statutory procedures intended principally for review of other forms of agency action for abuses of discretion. It conflicts directly with the leading decisions of this Court and other circuits on the availability of relief under the Declaratory Judgment Act, the Administrative Procedure Act, and the federal courts' general equity jurisdiction.

In its *Abbott* trilogy of 1967, the Court held that declaratory and injunctive remedies are discretionary in nature and are to be utilized according to the specific circumstances of each case. *Abbott Laboratories* v. *Gardner, supra*, 387 U.S. at 148. Moreover, in two decisions of that trilogy, the Court sustained discretionary jurisdiction to hear "pre-enforcement" claims against a federal agency for declaratory and injunctive relief where (a) the claims were fit for judicial review, (b) later enforcement remedies "at law" were of doubtful adequacy, and (c) the complaining parties faced the prospect of intervening harm and prejudice. 387 U.S. at 152-54; *Gardner* v. *Toilet Goods Association, Inc.*, 387 U.S. 167, 172-74 (1967). The Court considered a range of pertinent considerations, including impediments to the plaintiffs' reliance on enforcement proceedings to secure judicial review, monetary burdens, and the inefficiencies both to plaintiffs and the public of "later piecemeal resolution of the controversy in the context of individual enforcement proceedings." 387 U.S. 172-74.

Both *Abbott* and Section 10 of the Administrative Procedure Act, 5 U.S.C. § 703, require a pragmatic

determination of the adequacy of ostensible legal remedies. Other circuits have held, accordingly, that a decision to grant or withhold declaratory and injunctive relief is committed to the sound discretion of the district court, taking full account of special circumstances that warrant immediate judicial action to preserve rights, to assure effective relief, and to prevent unnecessary waste of private and public resources. *Standard Oil Co.* v. *Federal Trade Comm., supra*, 596 F.2d at 1387; *Exxon Corp.* v. *Federal Trade Comm., supra*, 588 F.2d at 900-02; *Central Hudson Gas & Electric Corp.* v. *U.S. Environmental Protection Agency, supra*, 587 F.2d at 559-60.

The district court below found multiple grounds for exercising its discretion under *Abbott* to assume jurisdiction over petitioners' claims.

1. *Ongoing Denial of Petitioners' Rights.* The FTC's assertion of prohibited investigative power against petitioners and others is ongoing and unabated. By not having prompt judicial determination of the legality of the omnibus Resolution, petitioners' constitutional rights are jeopardized.

First, petitioners are targets of a continuing civil investigation that does not conform to constitutional requirements or the agency's own rules. Second, petitioners are not afforded adequate protection against the unlawful seizure of their confidential and proprietary records, in which they possess legitimate ownership and privacy interests, which are in the custody of others.[33] As noted, the Commission affords no notice of such attempted

[33] Petitioners' continuing property and privacy interests in such records satisfy the Fourth Amendment standards prescribed by the Court. *See, e.g., Rakas* v. *Illinois*, ____, U.S. ____, 58 L.Ed. 2d 387, 405 n.16 (Dec. 5, 1978); *Jones* v. *United States*, 362 U.S. 257, 261 (1960); *see also United States* v. *Miller*, 425 U.S. 435, 442 (1976) (courts "must examine the nature of the particular documents sought to be protected" to determine protectible Fourth Amendment interests).

seizures and, even when the issuance of process for them becomes known, petitioners are not accorded the right to intervene and to be heard before the Commission to oppose the seizure of their records.

These circumstances alone fundamentally distinguish this case from *Reisman* v. *Caplin*, *supra*, on which the appellate court relied. In *Reisman*, which did not involve any challenge to agency practices, the Court expressly found that no risk of improper third-party production of the plaintiff's records was incurred, since only one subpoena was at issue and the plaintiff was assured a right of intervention to resist production. No such assurance exists for petitioners, as the district court expressly found.[34] (App. 25a).

Even greater harm to petitioners' constitutional rights is threatened once their property is seized by the Commission. Any seizure of records or data in which they possess proprietary or other commercial interests paves the way for the dissemination of such materials to other FTC staffs, other federal and state agencies, and even members of the public. The Commission's inability to guard effectively against even unofficial "leaks" of confidential, competitively-sensitive material is a matter of court record.[35] Seizure and threatened dissemination of

[34] The court of appeals stated that "... the [third-party] holder of such a document *might* be expected to give the originating party notice of receipt of a subpoena in time for that party to intervene and file a motion to quash before the Commission." (App. 19a; emphasis supplied). Practical experience dims that expectation, and Commission rules do not even provide for such intervention, which the FTC has stated it would resist.

[35] *See, e.g., Wearly* v. *Federal Trade Comm.*, 462 F. Supp. 589, 607 (D.N.J. 1978), documenting on an evidentiary record "the reality of the threat and risk" of disclosure by the FTC through both deliberate and inadvertent leakage of confidential and proprietary data obtained through its compulsory process.

confidential records poses an immediate threat of irreparable harm to petitioners' rights and interests. *Exxon Corp.* v. *Federal Trade Comm.*, *supra*, 588 F.2d at 902.

2. *Inadequacy of Later Statutory Review.* The scheme of review for FTC subpoenas adopted in Section 9 of the FTC Act is designed to require initial Commission review of individual subpoenas served by its staff and thereafter to provide a judicial avenue for their enforcement at the Commission's discretion. The adequacy of the statutory scheme for those purposes, in general application, is not challenged in this case. What is challenged, and what warrants review here, is the court of appeals' conclusion that Section 9 provides the *exclusive* procedure by which petitioners may seek relief from the Commission's continuing abuse of its power, as exercised against petitioners and others in the guise of "omnibus" resolutions.

As the district court found in exercising jurisdiction, the Declaratory Judgment Act is the appropriate and effective vehicle for an adjudication of agency misconduct in excess of its power of the type presented here. (App. 27a). By contrast, under Section 9, petitioners would first have to apply to the Commission to change its own entrenched view and thus be subjected to the prejudice which flows from the inevitable resulting delay in deciding their constitutional claims. Other practical difficulties impair even the eventual efficacy of subpoena review procedures as a means to adjudicate the claims presented.

One pernicious use of "omnibus" industry-wide resolutions, encouraged by the Commission in its Operating Manual, is the withholding or masking of the investigative purposes for which FTC process is issued. Such use may well serve an agency goal to avoid disclosure of its investigative purposes and, hence, disputes over their propriety or the relevance of specific investigative demands. However, this practice also subverts the very

statutory scheme for contesting, reviewing and enforcing individual subpoenas—the scheme urged by the Commission to be petitioners' exclusive remedy.

The FTC rules require that *all* objections to specific subpoenas, including the irrelevance and undue burden of individual specifications, must be raised simultaneously in a single motion to quash, or else be waived. 16 C.F.R. § 2.7 (1979). However, by consciously omitting the requisite notice of investigative scope and purpose, the FTC has effectively precluded petitioners from making those types of objections to its subpoenas, since questions of relevance and burden can only be addressed and later reviewed in relation to a stated, lawful FTC investigative purpose.[36] As the district court observed, a statement of investigative purpose and scope is an essential precondition to the contest and review of particular FTC subpoenas. (App. 24a-25a).

Moreover, courts have treated FTC-initiated subpoena enforcement proceedings as "summary" in nature. Typically, the Commission's subpoena specifications are reviewed on an "abuse of discretion" standard, in which the agency's investigatory resolutions are accepted as conclusive as to the investigation's scope and purpose. No inquiry is generally permitted into issues, such as those raised by the practice of omnibus investigations, of whether the FTC has stated what its actual investigative purposes are. *See Federal Trade Comm.* v. *Texaco, Inc.*, 555 F.2d 862, 871-72, 874 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977). One of the most recent FTC enforcement decisions in the District of Columbia Circuit, *Federal Trade Comm.* v. *Carter*, 464 F. Supp. 633, 638 (D.D.C. 1979),

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[36] *See, e.g., Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 208-09 (1946); *Montship Lines, Ltd.* v. *Federal Maritime Board*, *supra*, 295 F.2d at 155.

appeal pending, held that the scope of subpoena review was so narrow under circuit law that the court deemed it "irrelevant" and "useless" even to entertain allegations or evidence concerning "the 'actual' rather than the expressed purpose [as stated in the resolution] behind the Commission's actions in authorizing and conducting the investigation."

Thus, a summary subpoena enforcement procedure is neither designed to reach nor effective to adjudicate the claims of pervasive agency misconduct raised by the complaint.

3. *Waste of Public and Private Resources.* Exclusive reliance on Section 9 procedures would also entail considerable economic burdens on petitioners and waste substantial public and private resources. In this regard, the immense costs of developing detailed burden estimates in responding to individual subpoenas are a matter of record. Hardship to the businesses especially of Chrysler and American Motors would result from the diversion of key operating personnel and scarce working capital to develop particularized objections to subpoenas issued in an investigation which suffers a threshold constitutional defect. The district court specifically recognized "the possibility that one or more domestic automobile manufacturers, in an already limited community, could be severely damaged by an illegal investigation" without prompt judicial action. (App. 26a-27a).

The FTC itself spends more than a million dollars of public funds each year on the "omnibus" automobile investigation; its cost has increased regularly. A prompt adjudication of the constitutionality of the agency's exercise of power, as represented by the investigation, will prevent the waste of those public funds and agency resources. It will also help to avoid tainting numerous other agency proceedings with the fruits of the unlawful

"omnibus" investigation should petitioners' challenge be upheld. The guidance accorded the FTC by the adjudication will also beneficially affect the conduct of other "omnibus" industry-wide investigations which the FTC may be pursuing.

Under these circumstances, the "pragmatic" approach to exhaustion, adopted in *Abbott Laboratories*, fully justifies the district court's discretionary exercise of jurisdiction. The Second Circuit has so interpreted *Abbott* in *Central Hudson Gas & Electric Corp.* v. *U.S. Environmental Protection Agency, supra*, where jurisdiction was exercised because the EPA was alleged to be acting "in violation of a specific limitation on its power," thus requiring the plaintiff "to defend a proceeding that may later be declared a nullity." 587 F.2d at 559. That court of appeals summarized the practical considerations of hardship and public policy supporting immediate judicial review, including:

> "... the implications of the agency action on important public interests, ... the impact of the action on the industry involved, ... the disruptive effect of a subsequent declaration that prior proceedings were defective or void and that new proceedings must be held, ... the duplication and waste of putting off a decision which must inevitably be made by the courts, ... and the extent of the waste of governmental resources ...." (*Id.* at 559-60; citations omitted).

The foregoing factors to which the district court in this case gave weight in exercising jurisdiction were discounted by the court of appeals with little or no comment. Instead, the decision below holds that district courts are *precluded* from exercising their informed discretion to entertain substantial constitutional challenges

to continuing FTC practices if those challenges could be asserted as defenses to subsequent summary subpoena enforcement proceedings. This rigid holding, which regards Section 9 of the FTC Act as the exclusive remedy for the FTC's abuse of investigative power, seriously misconstrues the Court's holdings in *Reisman* and *Claire Furnace* and conflicts with the analysis and approach mandated in *Abbott*.

The important issues of federal jurisdiction presented by the decisions below warrant this Court's attention to provide needed clarification on the scope of district court discretionary jurisdiction to hear and decide constitutional claims relating to official abuses of power. By applying the Court's prior holdings in *Abbott* and *Leedom* to permit the exercise of jurisdiction in such cases in the sound discretion of the trial court, the Court also will insure a prompt and full adjudication of the significant constitutional questions raised by the FTC's formal adoption and implementation of "omnibus" industry-wide investigations.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

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DATED: August 25, 1979

APPENDIX.

APPENDIX A

No. 79-1048

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

AMERICAN MOTORS CORPORATION, et al.,
Plaintiffs-Appellees,
v.
FEDERAL TRADE COMMISSION, *et al.*,
Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed July 2, 1979.

Before: EDWARDS, Chief Judge, LIVELY and MERRITT, Circuit Judges.

EDWARDS, Chief Judge. This case represents a constitutional attack based on the Fourth and Fifth Amendments upon a Federal Trade Commission resolution and subsequent FTC subpoenas directed to the most important American automobile companies. Plaintiffs' complaint sought equitable relief from the United States District Court. The FTC resolution of August 6, 1976, authorized an industry-wide automobile investigation and directed the FTC staff:

> To investigate the acts, practices and methods of competition of General Motors Corporation, Ford Motor Company, Chrysler Corporation and other firms engaged in the production, sale, and distribution of automobiles to determine the effects thereof on the structure, conduct and performance of the automobile industry and whether

such acts, practices and methods of competition may have violated or are violating the Federal Trade Commission Act or other statutes administered by the Commission.

The subpoenas (one such addressed to American Motors was issued on July 10, 1978) seem to require the company concerned to furnish copies of just about all of its records bearing on production and sale of automobiles for the years running back to 1946 and, as far as forecasts are concerned, extending forward through at least the year 1980.

It is plaintiff automobile companies' contention that the subpoenas authorized by this resolution, and now sought to be enforced, are "general warrants" of the nature of King George III's "writs of assistance" which triggered the American Revolution. Further, they claim that this is a "fishing expedition" of the sort condemned in *FTC* v. *American Tobacco Co.*, 264 U.S. 298, 306 (1924), wherein Mr. Justice Holmes, speaking for a unanimous Court, condemned "fishing expeditions into private papers on the possibility that they may disclose evidence of crime." They rely strongly on Justice Holmes' comment: "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." *Id.*

Much water has, however, flowed under many bridges since 1924. As we shall see, Congress and the FTC have created both administrative and statutory remedies which plaintiffs have eschewed. These remedies and the Commission's broad power of investigation have been upheld by the United States Supreme Court in such cases as *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), and *FTC* v. *Claire Furnace Co.*, 274 U.S. 160 (1927). Interesting and challenging as are the claims which were presented to the District Court, the parties to this litigation and this court are required to follow the legal procedures as they have been laid down by Congress and the Supreme Court.

THE LEGAL ISSUES

The legal questions before us include at least the following:

1) Did the District Judge's "pretrial management order" have the effect of a preliminary injunction so as to make it appealable under 28 U.S.C. § 1292(a)(1) (1976)?

2) If so, should the District Court have dismissed this complaint because appellees have administrative and legal remedies which they are required to pursue and exhaust?

After careful review of this record and the applicable statutes and case law, we conclude that both questions must be answered in the affirmative. We also conclude that these answers are dispositive of this case and require reversal of the District Court's order and dismissal of these complaints.

We emphasize that this court has not reached the merits of appellees' claims. This decision is based purely upon the conclusion that appellees have mistaken their remedies, and all issues (including appellees' constitutional claims) sought to be presented for decision to the District Court can and must under the law be presented first to the FTC and, if rejected, may then be litigated under the applicable statutory provisions in subsequent enforcement proceedings in the Federal District Court prior to presentation to this court.

I. APPEALABILITY OF THE DISTRICT JUDGE'S ORDER

Plaintiffs in their complaint sought: "An injunction enjoining the Commission, its members, and staff . . . (ii) from enforcing any and all compulsory process which has been issued pursuant to the Resolution; . . . ."

The subpoenas at issue in this appeal were originally issued on May 26, 1978, and July 10, 1978. Plaintiffs obtained extensions for compliance until September 18, 1978, from the Commission, but filed their complaint in the instant case seeking both declaratory and injunctive relief on September

11, 1978. By agreement of the parties, the return dates of the subpoenas at issue were extended to November 15, 1978. Prior to that date the FTC filed a motion to dismiss, claiming plaintiffs had an adequate remedy at law and lack of venue.[1] This motion was denied by the District Court and on December 13, 1978, the court issued a pretrial management order extending the returns on the Commission's subpoenas "until further Order of the Court."

The order on its face (and as we believe it was interpreted by the District Judge) intended to stop the Commission's enforcement of its subpoenas for more than 10 days and clearly had that effect. It was issued without findings of fact and without compliance with Rules 52(a) and 65 of the Federal Rules of Civil Procedure. We do not believe that the District Court's characterization of his order as a "pretrial management order" is controlling.[2]

The general rule is: "[A]n interlocutory order that grants . . . an injunction may be broadly defined as an order that temporarily awards . . . a part or all of the permanent injunctive relief sought by a claimant, or that prevents . . . other litigation pendente lite." 9 MOORE'S FEDERAL PRACTICE ¶ 110.19[1]. The terms, intent, and effect of the order are such as to halt an investigation by an administrative agency for an indefinite period of time. It is also our view that the District Court's order of December 13, 1978, granted a major portion of the substantive relief sought by the complaint. For both of these reasons the District Judge's order must be characterized as a preliminary injunction which is appealable

[1] In a memorandum opinion dated November 15, 1978, the District Judge held that venue in the Eastern District of Michigan was proper. The FTC has not appealed this ruling, and, since the defense of improper venue is waivable (FED. R. CIV. P. 12(h)), we deem the FTC to have waived this claim.

[2] The Supreme Court stated in *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U.S. 188, 192 (1942): "The relief afforded by § 129 [a predecessor of § 1292(a)(1)] is not restricted by the terminology used. The statute looks to the substantial effect of the order made."

under 28 U.S.C. § 1292(a) (1) (1976).[3] *Reed* v. *Rhodes*, 549 F.2d 1050 (6th Cir. 1976); *International Products Corp.* v. *Koons*, 325 F.2d 403 (2d Cir. 1963); *Dowling Bros. Distilling Co.* v. *United States*, 153 F.2d 353 (6th Cir.), *cert. denied sub nom. Gould* v. *United States*, 328 U.S. 484 (1946).

In the *Dowling* case this court said:

> It is only when the power possessed by a court of equity is exercised to stay proceedings in another cause that such action amounts to the grant or refusal of an injunction, ...
>
> *Dowling Bros. Distilling Co.* v. *United States, supra* at 356.

In the *Koons* case the Second Circuit said:

> We think it better, in line with our prior decisions, to continue to read § 1292(a) (1) as relating to injunctions which give or aid in giving some or all of the substantive relief sought by a complaint . . . and not as including restraints or directions in orders concerning the conduct of the parties or their counsel, unrelated to the substantive issues in the action, while awaiting trial.
>
> *International Products Corp.* v. *Koons, supra* at 406. (Footnote omitted.)

We hold that this appeal is properly before this court and turn to the substantive issue which it presents.

[3] 28 U.S.C. § 1292(a) (1) (1976) provides:

> (a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . . .

II. EXHAUSTION OF ADMINISTRATIVE AND LEGAL REMEDIES

As a general rule parties are required to employ the statutorily provided administrative and legal remedies before seeking the general equitable relief which has been sought and granted here. This conclusion is supported by the applicable statutes and case law.

1. The Statutory Scheme

The Federal Trade Commission Act was adopted by Congress in 1914. 15 U.S.C. §§ 41, *et. seq.* In two sections of the Act, Congress gave the Commission broad investigative authority and the power to compel the production of evidence by subpoena.

Section 6(a) describes the Commission's authority to investigate:

> **(a) Investigation of persons, partnerships, or corporations**
>
> To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.
> 15 U.S.C. § 46(a) (1976).

Section 9 conveys the Commission's power of access to corporate books and the power of subpoena:

> For the purposes of this subchapter the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have

> power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.
>
> 15 U.S.C. § 49 (1976).

Section 9 also provides for the United States courts to enforce obedience to the Commission's subpoenas:

> Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.
>
> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.
>
> Upon the application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person, partnership, or corporation to comply with the provisions of this subchapter or any order of the Commission made in pursuance thereof.
>
> *Id.*

Section 9 also authorizes the Commission to take testimony by deposition and to require such witnesses "to . . . produce documentary evidence." *Id.*

In implementing these statutory powers, the FTC has adopted regulations and established procedures which: 1) allow the agency itself to initiate investigations, 16 C.F.R. § 2.1 (1978); 2) require that: "Any person under investigation compelled or requested to furnish information or documentary evidence shall be advised with respect to the purpose and scope of the investigation." 16 C.F.R. § 2.6 (1978); 3) require that an FTC resolution initiating an investigation must "adequately set forth the 'Nature and Scope of Investigation,'" Federal Trade Commission, *Operating Manual* § 3.2 (1978); and 4) provide procedures whereby a "motion to limit or quash any investigational subpoena" can be made before the Commission. 16 C.F.R. § 2.7(b)-(d) (1978).

It is difficult to imagine how Congress could have given an agency greater powers of investigation than the ones described above. This breadth was also made evident in the provisions of the Administrative Procedures Act, 5 U.S.C. §§ 551-559, 701-706 (1976). Section 703 of the Act provides:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute . . . .

It appears that this enactment by Congress serves to emphasize the FTC provisions previously quoted from Section 9 of the Act, which requires FTC enforcement of its subpoenas by proceedings in an appropriate United States District Court where, as we shall see, the parties against whom the proceeding is brought may raise any available defenses.

In addition, Section 706 of the Administrative Procedures Act appears to have narrowed the scope of judicial review by the District and Appellate court by application of the "arbitrary and capricious" standard.

2. The Case Law

Despite the apparent breadth of the statutory grant of investigatory power to the FTC which has been relatively unchanged since 1914, courts have not always so enforced it. As we have pointed out at the outset, the United States Supreme Court found the investigation involved in *FTC* v. *American Tobacco Co., supra,* to have offended against restrictions imposed by the Fourth Amendment to the United States Constitution. However, major case law increases in the administrative agency powers appear to have started in the 1940s. In *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186 (1946), the Supreme Court held that the Fifth Amendment affords no protection against self-incrimination as to either corporations or their officers, and at most, it appears to say that the Fourth Amendment, if applicable, guarded only against abuse by too much indefiniteness or breadth in things required to be statutorily "particularly described":

> As this has taken form in the decisions, the following specific results have been worked out. It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. This has been ruled most often perhaps in relation to grand jury investigations, but also frequently in respect to general or statistical investigations authorized by Congress. The requirement of "probable cause, supported by oath or affirmation," literally applicable in the case of a warrant, is satisfied in that of an order for production by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, including particularity in "describing the place to be searched, and the persons or things to be seized," also literally applicable to war-

> rants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.
>
> *Oklahoma Press Publishing Co.* v. *Walling, supra* at 208-09. (Footnotes omitted.)

Of even greater importance is the discussion of Justice Holmes' "fishing expedition" language written by Justice Jackson for a unanimous Court in *United States* v. *Morton Salt Co., supra:*

> We must not disguise the fact that sometimes, especially early in the history of the federal administrative tribunal, the courts were persuaded to engraft judicial limitations upon the administrative process. The courts could not go fishing, and so it followed neither could anyone else. Administrative investigations fell before the colorful and nostalgic slogan "no fishing expeditions." It must not be forgotten that the administrative process and its agencies are relative newcomers in the field of law and that it has taken and will continue to take experience and trial and error to fit this process into our system of judicature. More recent views have been more tolerant of it than those which underlay many older decisions. Compare *Jones* v. *Securities & Exchange Comm'n*, 298 U.S. 1, with *United States* v. *Morgan*, 307 U.S. 183, 191.
>
> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged

> with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.
>
> *Id.* at 642-43.

Having recognized that the FTC's investigative powers are great, Justice Jackson did acknowledge that there were constitutional limits:

> It is unnecessary here to examine the question of whether a corporation is entitled to the protection of the Fourth Amendment. *Cf. Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186. Although the "right to be let alone — the most comprehensive of rights and the right most valued by civilized men," Brandeis, J., dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 471, at 478, is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process, *Boyd* v. *United States*, 116 U.S. 616, *Hale* v. *Henkel*, 201 U.S. 43, 70, neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret. *Hale* v. *Henkel, supra; United States* v. *White*, 322 U.S. 694.
>
> While they may and should have protection from unlawful demands made in the name of public investigation, *cf. Federal Trade Comm'n* v. *American Tobacco Co.*, 264 U.S. 298, corporations can claim no equality with individuals in the enjoyment of a right to privacy. . . . Even if one were to regard the request for information

in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. *Federal Trade Comm'n* v. *American Tobacco Co., supra.* But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. "The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 208.

Id. at 651-53.

With these general principles of the applicable law in mind, we turn now to the nature of the remedy available to parties upon whom FTC subpoenas have been served. Early in Supreme Court FTC law the Court decided how the rights of a corporation which had been ordered to submit reports to the Commission could be vindicated. The corporation had (as in our present case) sought and obtained federal court injunctive relief before enforcement proceedings had been commenced. Mr. Chief Justice Taft, writing for the Court, held:

> It was intended by Congress in providing this method of enforcing the orders of the Trade Commission to impose upon the Attorney General the duty of examining the scope and propriety of the orders, and of sifting out of the mass of inquiries issued what in his judgment was pertinent and lawful before asking the Court to adjudge forfeitures for failure to give the great amount of information required or to issue a mandamus against those whom the orders affected and who refused to comply. The wide

> scope and variety of the questions, answers to which are asked in these orders, show the wisdom of requiring the chief law officer of the Government to exercise a sound discretion in designating the inquiries to enforce which he shall feel justified in invoking the action of the court. In a case like this, the exercise of this discretion will greatly relieve the court and may save it much unnecessary labor and discussion. The purpose of Congress in this requirement is plain, and we do not think that the court below should have dispensed with such assistance. Until the Attorney General acts, the defendants can not suffer, and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them. That right being adequate, they were not in a position to ask relief by injunction. The bill should have been dismissed for want of equity.
>
> This conclusion leads to a reversal of the decree of the District Court of Appeals and a remanding of the case to the Supreme Court of the District with direction to dismiss the bill.

FTC v. *Claire Furnace Co.,* 274 U.S. 160, 174-75 (1927).

This case has never been overruled and it appears clearly to mandate the corporation's use of its defenses at any forthcoming FTC enforcement proceeding as its remedy. *See also St. Regis Paper Co.* v. *United States,* 368 U.S. 208, 225-26 (1961); *FTC* v. *Maynard Coal Co.,* 22 F. 2d 873 (D.C. Cir. 1927); *Anheuser-Busch, Inc.* v. *FTC,* 359 F. 2d 487, 490-91 (8th Cir. 1966).

Finally, we turn to a much more recent Supreme Court case which deals with the requirement of exhaustion of remedy. In *Reisman* v. *Caplin, supra,* the Supreme Court held that petitioners who had sought declaratory and injunctive relief in the District Court had an adequate remedy at law and dismissed the complaint for want of equity. In *Reisman,* an

dismissed the complaint for want of equity. In *Reisman* an internal revenue case, the taxpayers' attorneys sought declaratory and injunctive relief against the Commissioner and the taxpayers' accounting firm which had been issued summonses for taxpayers' books. In *Reisman*, as here, no enforcement proceedings had been started. In this case also the Supreme Court held petitioners had an adequate remedy at law and dismissed the complaint.

The Court's opinion discussed many of the specific arguments of the automobile companies in this present case:

> It is urged that the penalties of contempt risked by a refusal to comply with the summonses are so severe that the statutory procedure amounts to a denial of judical review. The leading cases on this question are *Ex parte Young*, 209 U.S. 123 (1908), and *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331 (1920). However, we do not believe that this point is well taken here. In *Young* certain railroad rates could be tested only by a failure to comply, which occasioned a risk of both imprisonment and large fines, regardless of the willfulness of the refusal to comply. And in *Oklahoma Operating Co.* the laundry rate fixed by the Oklahoma Corporation Commission could be tested only by contempt with a penalty of $500 per day, each day being a separate violation.
>
> On the other hand, in tax enforcement proceedings the hearing officer has no power of enforcement or right to levy any sanctions. It is true that any person summoned who "neglects to appear or to produce" may be prosecuted under § 7210[5] and is subject to a fine not exceeding $1,000, or imprisonment for not more than a year, or both. However, this statute on its face does not apply where the witness appears and interposes good faith challenges to the summons. It only prescribes punishment where the witness "neglects" either to appear or to produce. We need not pass upon the coverage of this provision in light of the facts here. It is sufficient to say that noncompliance is not subject to prosecution thereunder when the summons is attacked in good faith.
>
> Petitioners also point to § 7604(b) as posing the risk of arrest should the Commissioner proceed under that section for an "attachment . . . as for a contempt." Arguably, such a sanction, even though temporary, might be a penalty severe enough to bring the section within the rationale of *Young, supra*, but we do not so read § 7604 (b). This section provides that where "any person summoned . . . neglects or refuses to obey such summons" the Commissioner may proceed before the United States Commissioner or the judge of the District Court "for an attachment against him as for a contempt." Upon a showing of "satisfactory proof," an attachment for the person so refusing is issued and he is brought before the United States Commissioner or the district judge who proceeds "to a hearing of the case." Upon the hearing the United States Commissioner or the district judge may "make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts . . . ." . . . As we read the legislative history, § 7604(b) remains in this comprehensive procedure provided by Congress to cover only a default or contumacious refusal to honor a summons before a hearing officer. But even in such cases, just as in a criminal prosecution under § 7210, the witness may assert his objections at the hearing before the court which is authorized to make such order as it "shall deem proper." § 7604(b).
>
> *Reisman* v. *Caplin, supra* at 446-449. (Footnotes, except Footnote 5, omitted.)

[5] Internal Revenue Code of 1954, § 7210: "Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 6420(e) (2), 6421 (f) (2), 7602, 7603, and 7604 (b), neglects to appear or to produce such books, accounts, records, memoranda, . . .

The Court concluded by rejecting plaintiffs' other assertions of the inadequacy of the statutory scheme:

Furthermore, we hold that in any of these procedures before either the district judge or United States Commissioner, the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, *Boren* v. *Tucker*, 239 F. 2d 767, 772-773, as well as that it is protected by the attorney-client privilege, *Sale* v. *United States*, 228 F. 2d 682. In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, may intervene. See *In re Albert Lindley Lee Memorial Hospital, supra*, and *Corbin Deposit Bank* v. *United States, supra*. And this would be true whether the contempt be of a civil or criminal nature. Cf. *McCrone* v. *United States*, 307 U.S. 61 (1939); *Brody* v. *United States*, 243 F. 2d 378. Finally, we hold that such orders are appealable. See *O'Connor* v. *O'Connell*, 253 F. 2d 365 (C. A. 1st Cir.); *In re Albert Lindley Lee Memorial Hospital, supra; Falsone* v. *United States, supra; Bouschor* v. *United States*, 316 F. 2d 451 (C. A. 8th Cir.); *Martin* v. *Chandis Securities Co.*, 128 F. 2d 731 (C. A. 9th Cir.); *D. I. Operating Co.* v. *United States*, 321 F. 2d 586 (C. A. 9th Cir.). Contra, *Application of Davis*, 303 F. 2d 601 (C.A. 7th Cir.). It follows that with a stay order a witness would suffer no injury while testing the summons.

Reisman v. *Caplin, supra* at 449.

Although the *Reisman* case is not concerned with the FTC Act, it is impossible for us to distinguish its requirement of exhaustion of statutory remedies in relation to the IRS subpoenas from the same requirement in relation to the FTC subpoenas involved in this case.

In an opinion by Judge (now Justice) Blackmun for the Eighth Circuit, the court held:

> We therefore view these corresponding provisions of the Federal Trade Commisison Act and of the Internal Revenue Code of 1954 as *in pari materia*. See Handler, Recent Antitrust Developments — 1964, 63 Mich.L.Rev. 59, 90-92 (1964).

Anheuser-Busch, Inc. v. *FTC, supra* at 490.

III. OTHER ISSUES

1. The Declaratory Judgment Issue

Plaintiffs' complaint, in addition to seeking injunctive relief against the proposed FTC investigation, also sought a declaratory judgment holding that the FTC Resolution authorizing an investigation violated plaintiffs' Fourth and Fifth Amendment rights and was invalid. The District Judge never reached this issue. No declaratory judgment was issued and, of course, no appeal was taken. Appellees' brief, however, appears to argue for our adjudication of the asserted invalidity of the Resolution on its face. Since, as indicated above, we believe that the District Judge should have dismissed this complaint because of failure to exhaust statutorily provided administrative remedies, we should point out that any deficiencies in the Resolution are also subject to correction in the administrative process.

Plaintiffs allege, for example, that contrary to an FTC Operating Manual rule, the Resolution does not identify the statute's provisions with which the investigation is concerned. Section 3.7(B) of the FTC Operating Manual provides:

> (2) The body of the resolution must adequately set forth the "Nature and Scope of Investigation." A mere citation of the statute (e.g., Section 5, Federal Trade Commission Act) does not constitute an adequate statement of the nature and scope of the investigation. The statement may be brief but must be specific to enable a court to determine whether: (a) the investigation is within the authority of the Commission; (b) the material demanded is relevant to the investigation; and (c) the

> material demanded is reasonable in scope. . . . The statement should also include the charges, the products and geographic area involved.

No effort to secure administrative cure of this alleged defect by filing a motion to quash before the FTC has as yet been made. And, of course, since no enforcement proceedings have been undertaken by the FTC, plaintiffs have not raised this claimed deficiency before the court charged with hearing the enforcement action.

In *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967) (where the Supreme Court authorized direct District Court review because the plaintiff faced immediate penalties), Justice Harlan, writing for the Court, describe a two-pronged test:

> A further inquiry must, however, be made. The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution. Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.
>
> *Abbott Laboratories* v. *Gardner, supra* at 148-49 (Footnote omitted.)

Plaintiffs' problem here, of course, is with the second prong of the test, since the FTC procedures outlined above require

the Commission to seek sanctions for refusal to comply with its orders in enforcement proceedings in the District Courts.

Finally, we note the applicability to this issue of the policy (laid down in *W.E.B. DuBois Clubs of America* v. *Clark,* 389 U.S. 309, 311-12 (1967)) of requiring that constitutional claims be adjudicated in a "factual context."

2. The Third Party Subpoenas

Plaintiffs assert that Fourth and Fifth Amendment rights are being threatened by the fact that subpoenas have been directed to third parties for documents in which they claim possessory rights. They also assert that information which is of the nature of trade secrets is contained in some of the records which have been or may be sought.

Parties who place documents in channels of commerce in the normal course of business do not normally retain such "expectation of privacy" as to represent a Fourth Amendment interest. *Couch* v. *United States,* 409 U.S. 322 (1973); *United States* v. *Miller,* 425 U.S. 435 (1976); *United States* v. *Cleveland Trust Co.,* 474 F.2d 1234 (6th Cir.), *cert. denied sub nom. Miceli* v. *United States,* 414 U.S. 866 (1973).

Where, as is suggested here, such privacy rights have been retained, the Supreme Court has made it clear that those rights may be raised by intervention of the claimant by motion to quash before the FTC or at the enforcement proceeding. *See Reisman* v. *Caplin, supra* at 449.

Normally, if there have been measures taken by the one who utters a document to retain privacy rights, the holder of such a document might be expected to give the originating party notice of receipt of a subpoena in time for that party to intervene and file a motion to quash before the Commission.

This record discloses no facts which suggest that we should require the FTC to bear the burden of notifying third parties of its intention to issue subpoenas.

3. The Ford Motor Case

As indicated at the outset, the FTC Resolution contemplated and resulted in the search for information from all major domestic automobile companies, including Ford Motor Company. Ford, however, did not join in the complaint with which we now deal. On the contrary, we are advised that Ford Motor did proceed to file motions to quash the subpoena issued to it before the FTC.

By motion to supplement the record (which we hereby grant), plaintiffs-appellees in this case advise that the FTC has recently denied the Ford motion to quash and that Ford has filed an action similar to that of plaintiffs herein in the United States District Court for the Eastern District of Michigan. We are, therefore, urged to accept this information as further proof that plaintiffs-appellees have no remedy other than the one presently sought.

In response to the motion to supplement the record, the FTC advises the court that while the FTC did deny the motion to quash, it did so after granting "substantial modifications" of the Ford subpoena which the FTC estimates will cut the Ford compliance burden in half.

Contrary to convincing us that the administrative and statutory judicial remedies outlined above are inadequate, we feel the Ford result serves to illustrate and helps to justify the requirement of exhaustion of remedies. Plainly, the FTC did listen and act upon Ford's complaints. We have, of course, no way of judging the adequacy of its answer nor of knowing whether our present plaintiffs could present facts which would require a more favorable administrative remedy.

In *Morton Salt* the Supreme Court pointed out:

> If respondents had objected to the terms of the order, they would have presented or at least offered to present evidence concerning any records required and the cost of their books, matters which now rest on mere assertions in their briefs. The Commission would have had opportunity to disclaim any inadvertent excesses or to justify their demands in the record. We think these respondents could have obtained any reasonable modifications necessary, but, if not, at least could have made a record that would convince us of the measure of their grievance rather than ask us to assume it.
>
> *United States* v. *Morton Salt Co.*, 338 U.S. 632, 633-34 (1950).

RECAPITULATION

We hold, for the reasons outlined above, that plaintiffs have administrative and statutory remedies available to them which they must exhaust. They have the right to file motions to quash before the FTC and to file objections before the District Court in any subsequent enforcement proceeding. These motions and objections can be raised in both forums.

The motions and objections referred to above include:

a) claims of constitutional violations;
b) invalidity for lack of specificity of the FTC Resolution;
c) overbreadth and lack of relevance of the subpoenas;
d) excessiveness of cost of compliance;[4]
e) any other meritorious defense.

In the event any or all of these claims are rejected at both the Commission and the District Court level, they can be brought again before this court, this time on an evidentiary record which reflects an adversary trial of all disputed issues of fact.

The judgment of the District Court appealed from in this case is reversed and the case is remanded for dismissal of the complaint.

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[4] *See SEC* v. *Arthur Young & Co.*, 584 F.2d 1018 (D.C. Cir. 1978).

APPENDIX B

United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN MOTORS CORPORATION, et al.,
Plaintiffs
-vs-
FEDERAL TRADE COMMISSION, et al.,
Defendants

CIVIL ACTION

NO. 8-72335

MEMORANDUM OPINION

On August 2, 1976, members of the Federal Trade Commission (hereinafter "FTC") approved a resolution which authorized an industry-wide investigation of the United States automobile industry. The resolution reads as follows

> To investigate the acts, practices and methods of competition of General Motors Corporation, Ford Motor Company, Chrysler Corporation and other firms engaged in the production, sale, and distribution of automobiles to determine the effects thereof on the structure, conduct and performance of the automobile industry and whether such acts, practices and methods of competition may have violated or are violating the Federal Trade Commission Act or other statutes administered by the Commission.

For nearly two years thereafter the automobile manufacturers voluntarily cooperated with the FTC in an attempt to coax the agency to state a purpose for the investigation beyond that set forth in the resolution and

to narrow the scope of the investigation. These efforts went for nought when the FTC issued formal subpoenas duces tecum on July 10, 1978.[1]

In response, American Motors Corporation; Chrysler Corporation; General Motors Corporation; Dalgleish Cadillac, Inc.; and Charnock Olds, Inc., filed an action against the FTC and its Commissioners for declaratory and injunctive relief. The basis for plaintiffs' complaint is that the unstated purpose and unlimited scope of the resolution violates plaintiffs' Fourth and Fifth Amendment rights.[2] The FTC now brings this motion to dismiss or transfer.

The FTC makes three arguments in support of its motion to dismiss, and concludes with the allegation that plaintiffs have failed to state a claim upon which relief can be granted. Rule 12(b)(6), F.R.Civ.P.

The FTC's first argument is that this case should be dismissed due to the failure of plaintiffs to exhaust their administrative remedies. While conceding that there is no administrative procedure for directly challenging an authorizing resolution, the FTC contends that plaintiffs must first seek relief through motions to quash or limit the subpoenas before they are entitled to access to the courts.

Ordinarily, courts will not interfere with an agency until it has completed its action. This general rule is

[1] The subpoena to General Motors Corporation is over 57 pages in length, and makes 199 multi-part requests for documents which cover virtually every aspect of the automobile industry. The information sought includes records that date back to 1946 and extends to forecasts of 1980. The subpoenas to the other automobile manufacturer plaintiffs are similar in length and scope.

It should also be noted that upon repeated questioning by this Court, both in chambers and in open court, the FTC has declined to state any purpose for the investigation other than that contained in the resolution.

[2] Of particular concern to plaintiffs is the highly confidential trade, proprietary, and financial information sought from them and from third parties, and the fear that this information will fall into the hands of their competitors.

subject to three exceptions: (1) where the agency has clearly violated a right secured by statute or agency regulation; (2) where the issue involved is a strictly legal one not involving an agency's expertise or any factual determination; or (3) where the issue cannot be raised on judicial review of a later order of the agency. *Borden, Inc.* v. *Federal Trade Comm.*, 495 F.2d 785 (7th Cir. 1974).

The case before the Court falls squarely into the second exception to the general rule. Plaintiffs' complaint alleges a substantial constitutional deprivation; this is purely a question of law. It has been recognized that constitutional questions are particularly within the expertise of the courts. *See*, e.g., *Califano* v. *Sanders*, 430 U.S. 99,109 (1977); *Airline Pilots Ass'n.* v. *Dept. of Transportation*, 446 F.2d 236,241 (5th Cir. 1971); *School Dist. of City of Saginaw* v. *Dept. of HEW*, 431 F.Supp. 147,153 (E.D.Mich. 1977).

In support of its position, the FTC relies primarily upon *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), and *School Dist. of City of Saginaw, supra*. These cases, however, are readily distinguishable from the case at bar in that both cases involved factual questions which were best resolved by an administrative agency. The instant case presents no factual questions or questions which involve the FTC's expertise.

Moreover, this Court agrees with plaintiffs that there is no adequate administrative procedure available to them. A motion to quash or limit a subpoena is a back-door method of challenging an authorizing resolution. Because a subpoena is issued to carry out the purpose and intent of an authorizing resolution, a proper resolution must precede a subpoena. *See, McMann* v. *Securities & Exchange Comm.*, 87 F.2d 377,379 (2nd Cir. 1937).

The inadequacy of a motion to quash as a method of challenging a resolution is further illustrated by the fact that a motion to quash must include all defenses to a

subpoena, such as relevance, materiality, confidentiality, and burden. Without a statement of purpose and scope of an investigation to serve as standards, it is impossible to raise such defenses.

This Court is especially concerned with the highly confidential information sought by the FTC. A dissemination of this data, whether innocent or intentional, would have a disastrous effect on plaintiffs. Although the FTC assures this Court that adequate protections exist should the information come into its hands, the statutory sanctions against disclosure of proprietary information were found to be inadequate in *Wearly* v. *Federal Trade Comm.* (Dkt.#77-1860, D.N.J. 1978). It would be cold comfort to plaintiffs to know that a discloser has been caught and brought to justice while their competitiors use the information to plaintiffs' detriment.

This problem is complicated by the fact that confidential information is also sought from third parties. The FTC has no procedure for challenging third-party subpoenas. The agency offers no guidance on this matter other than to say that it has permitted third-party challenges in some instances in the past, but it has no way of knowing how it would rule if plaintiffs contested the third-party subpoenas in the present case. The agency's position highlights the inadequacy of a motion to quash as a method to challenge the resolution.

The FTC's second argument alleges that plaintiffs' complaint fails to satisfy the Administrative Procedure Act (hereinafter "APA"), which thereby deprives the court of subject matter jurisdiction. This Court disagrees.

Plaintiffs' complaint states that subject matter jurisdiction over this action is provided by the "federal question" statute, 28 U.S.C. §1331(a), and the "laws affecting commerce" statute, 28 U.S.C. §1337. Hence, this Court has subject matter jurisdiction over the complaint. *See, Exxon Corp.* v. *Federal Trade Comm.*, 411 F.Supp. 1362,

1368-1369 (D.Del. 1976); *General Motors Corp.* v. *Federal Trade Comm.*, 1978-1 Trade Cases ¶62,005, at ¶74,289 (N.D.Ohio 1977); *Wearly* v. *Federal Trade Comm.* (Dkt.#77-1860, 18 (D.N.J. 1978).

The FTC goes on to argue that judicial consideration of this matter should be denied because this controversy is not ripe for judicial review. The basic rationale of the ripeness doctrine is to prevent the courts from entangling themselves in abstract disagreements over administrative policies, and to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging party. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967).

Plaintiffs' constitutional challenge to the FTC's resolution is sufficiently ripe for judicial review. The controversy is adequately definite and concrete because the resolution is a final expression of the agency's position. A resolution is the only procedure provided for launching an investigation, is voted on by the Commissioners themselves, as opposed to subordinates, and is the only official statement by the agency of the scope and purpose of the investigation.

Moreover, the impact of the resolution has been felt by plaintiffs in terms of expenses incurred and disruption of their businesses. While a certain amount of expense and disruption is involved in every investigation, this is no ordinary case. General Motors itself has already spent $700,000.00 in order to determine how much it will ultimately cost to comply with the subpoena.[3] Although General Motors has the financial resources to absorb this initial expense, not all the other automobile manufacturers have that ability. This Court will not turn a deaf ear to the complaints of plaintiffs while there is the

[3] It has been revealed at a pretrial conference that the ultimate cost of compliance to General Motors could go as high as $16,000,000.00.

possibility that one or more domestic automobile manufacturers, in an already limited community, could be severely damaged by an illegal investigation. It is also disturbing to this Court that plaintiffs' constitutional allegations are met with procedural responses.

The equities in the present case require that the Court exercise its discretion in favor of plaintiffs, which distinguishes this case from those provided by the FTC. In *Parke, Davis & Co.* v. *Califano*, 564 F.2d 1200 (6th Cir. 1977), *cert. den.*, 98 S.Ct. 1253 (1978), the Sixth Circuit found that the District Court abused its discretion to enjoin the FDA where pending enforcement actions provided an opportunity for a full hearing on all issues raised in plaintiffs' complaint. There is no adequate administrative procedure for resolving the dispute in the present case. The District Court in *General Motors Corp.* v. *Federal Trade Comm.*, *supra*, granted the FTC's motion to dismiss where a factual question existed which was best decided by the agency. There are no factual questions to be resolved in the case at bar. Lastly, the District Court exercised its discretion against judicial intervention in *Exxon Corp.* v. *Federal Trade Comm.*, *supra*, where the controversy revolved around information subpoenaed by the agency and a procedure existed for challenging the subpoena. As previously stated, *there is no administrative procedure for challenging a resolution.*

The FTC's motion to dismiss for failure to state a claim upon which relief can be granted must accordingly be denied. This Court expressly rejects the FTC's assertion that the dealership plaintiffs should be dismissed from this action on the authority of *U. S.* v. *Miller*, 425 U.S. 435 (1976), since the ownership of the records turned over to General Motors and the circumstances surrounding that disclosure are yet to be determined.

The FTC next argues that this case should be transferred because venue is improperly laid in this District.

Venue in civil actions against federal officers and agencies is governed by 28 U.S.C. §1391(e), which provides that an action may be brought in any judicial district in which (1) a defendant in the action resides; (2) the cause of action arose; (3) any real property involved in the action is situated; or (4) the plaintiff resides if no real property is involved in the action. It is uncontested that the purpose behind this statute is to broaden the number of places where federal officers and agencies can be sued. *Reuben H. Donnelley Corp.* v. *Federal Trade Comm.*, 580 F.2d 264 (7th Cir. 1978).

The FTC admits that venue is proper in this District for the dealership plaintiffs. This is all that is required to establish venue for all plaintiffs. *Candarini* v. *Atty. Gen. of the U. S.*, 369 F.Supp. 1132 (E.D.N.Y. 1974); *Holtzman* v. *Richardson*, 361 F.Supp. 544 (E.D.N.Y. 1973), *rev'd. on other grounds*, 484 F.2d 1307 (2nd Cir. 1973), *cert. den.*, 416 U.S. 936 (1974); *Natural Resources Defense Council, Inc.* v. *Tennessee Valley Authority*, 340 F.Supp. 400 (S.D.N.Y. 1971), *rev'd. on other grounds*, 459 F.2d 255 (2nd Cir. 1972); *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 325 F.Supp. 728 (E.D.Ark. 1970), *aff'd.*, 470 F.2d 289 (8th Cir. 1972), *cert. den.*, 412 U.S. 931 (1973).

Accordingly, this Court will deny the Motion of Defendant Federal Trade Commission to Dismiss or Transfer.

Fred W. Kaess
United States District Judge

Dated: November 15, 1978.
Detroit, Michigan.

United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN MOTORS CORPORATION, et al.,
Plaintiffs
-vs-
FEDERAL TRADE COMMISSION, et al.,
Defendants

CIVIL ACTION

No. 8-72335

ORDER DENYING MOTION OF DEFENDANT FEDERAL TRADE COMMISSION TO DISMISS OR TRANSFER

At a session of said Court, held in the Federal Courthouse, in the City of Detroit, Wayne County, Michigan, this 15th day of November, A. D. 1978;

Present: THE HONORABLE FRED W. KAESS
United States District Judge

The Motion of Defendant Federal Trade Commission having been duly considered by this Court, and a decision having been rendered in a Memorandum Opinion of even date herewith;

IT IS ORDERED that the Motion of Defendant Federal Trade Commission to Dismiss or Transfer be, and hereby is, denied.

Fred W. Kaess
United States District Judge

APPENDIX C

United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN MOTORS CORPORATION, et al.,
Plaintiffs
-vs-
FEDERAL TRADE COMMISSION, et al.,
Defendants

CIVIL ACTION

No. 8-72335

ORDER DENYING MOTION OF DEFENDANT FEDERAL TRADE COMMISSION FOR RECONSIDERATION AND PRETRIAL MANAGEMENT ORDER

At a session of said Court, held in the Federal Building, in the City of Detroit, Wayne County, Michigan, this 13th day of December, A. D. 1978;

Present: THE HONORABLE FRED W. KAESS
United States District Judge

This matter comes before the Court on Plaintiffs' Motion for a Pretrial Management Order Establishing Schedules and Deferring Subpoena Return Dates and Defendant's Motion for Reconsideration of the Court's Order of November 15, 1978.

Being unpersuaded that any of the recent developments cited by the Defendant disturbs the fundamental premise of the Order of November 15, 1978—that there is no adequate administrative procedure for directly challenging an investigative resolution—IT IS ORDERED that Defendant's Motion for Reconsideration be, and hereby is, denied.

In the exercise of its discretion to establish appropriate schedules to be followed by the parties in expeditiously preparing and presenting this case for final adjudication, the Court hereby enters the following Pretrial Order:

1. The period of discovery shall be concluded on or before February 16, 1979, unless extended by further Order of the Court. Discovery shall be limited to those matters contained in Plaintiffs' Complaint.

2. Any motion for summary judgment, together with supporting materials and briefs, shall be filed on or before March 5, 1979.

3. Opposing briefs, together with supporting materials, shall be filed within thirty (30) days from service of the moving party's papers.

4. Reply briefs in support of summary judgment shall be filed within fifteen (15) days from the service of the opposing party's responding brief.

5. In the event no motion for summary judgment is filed as of March 5, 1979, the Court will set the matter for a pretrial conference to determine the procedure and timing to be followed in reaching a prompt final judgment.

6. The deadline of December 15, 1978 presently scheduled by the Court's Pretrial Order of November 6, 1978, for returns on, or motions addressed to, the subpoenas heretofore issued by the Defendant Commission in its investigation File No. 761-0083 to plaintiffs, or for records or information pertaining to plaintiffs, is hereby extended and deferred until further Order of the Court.

The Court considers this Pretrial Order appropriate, especially in view of the Court's Order and Memorandum Opinion entered on November 15, 1978, denying defendants' motion to dismiss, to accomplish several salutary objectives. The schedule set forth in this Order will, with

the parties' cooperation, assure the expeditious presentation of this case to the Court, and provide it with an adequate opportunity both to consider plaintiffs' claims on their merits and to grant full relief, if and as appropriate. Moreover, the plaintiffs will be spared, *pendente lite*, unnecessary prejudice from having either to pursue prematurely an inadequate and highly expensive administrative procedure or to risk forfeiture of important procedural and substantive rights.

Fred W. Kaess
United States District Judge

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49 provides:

"§ 49. Documentary evidence; deposition; witnesses

"For the purposes of sections 41 to 46 and 47 to 58 of this title the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

"Upon the application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person, partnership, or corporation to comply with the provisions of sections 41 to 46 and 47 to 58 of this title or any order of the Commission made in pursuance thereof.

"The Commission may order testimony to be taken by deposition in any proceeding or investigation pending under said sections at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

"Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States."

The Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, provides:

"§2201. Creation of remedy

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

"§ 2202. Further relief

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

In pertinent part, Section 10 of the Administrative Procedure Act, 5 U.S.C. § 703, provides:

"§ 703. Form and venue of proceeding

"The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by

statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

APPENDIX E

United States of America
Before Federal Trade Commission

COMMISSIONERS:

Calvin J. Collier, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole

RESOLUTION DIRECTING USE OF COMPULSORY PROCESS IN NONPUBLIC INVESTIGATION

File No. 761 0083

Nature and Scope of Investigation:

To investigate the acts, practices and methods of competition of General Motors Corporation, Ford Motor Company, Chrysler Corporation and other firms engaged in the production, sale, and distribution of automobiles to determine the effects thereof on the structure, conduct and performance of the automobile industry and whether such acts, practices and methods of competition may have violated or are violating the Federal Trade Commission Act or other statutes administered by the Commission.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation.

Authority to Conduct Investigation:

Sections 6, 9, and 10 of Federal Trade Commission Act, 15 U.S.C. 46, 49, 50; FTC Procedures and Rules of Practice 16 C.F.R. 1.1, et seq. and supplements thereto.

By direction of the Commission.

JAMES O. TOBIN /S/
Acting Secretary

SEAL

Dated: August 2, 1976

APPENDIX F

02 AUG 1976

Honorable Calvin J. Collier
Chairman
Federal Trade Commission
Washington, D.C. 20500

Dear Mr. Chairman:

Pursuant to the liaison procedure between the Federal Trade Commission and the Department of Justice, the Commission has requested clearance to conduct a broad investigation of the automobile industry. We understand that the Commission has completed a detailed economic study and now desires to conduct a comprehensive investigation to determine whether or not violations of Section 5 of the Federal Trade Commission Act are present.

Subject to the following conditions, the Department is prepared to process the clearance request without objection. First, this clearance would not foreclose the Department of Justice from future specific investigations in this industry, including particularly investigations of a criminal nature. Any such future investigations would be subject to normal clearance procedure. In that connection, the Commission, consistent with our established practice, would undertake to advise the Department if any evidence of a potential criminal nature is uncovered.

Second, at the conclusion of the investigation, the Department would be given access to information obtained by the Commission. Obviously, this would be of particular importance if the Commission should decide that no action under Section 5 were appropriate.

If these conditions are acceptable, please let us know and we will proceed to process the clearance request.

As a final point, I should note that the Department has a substantial number of documents obtained by grand jury subpoena during the course of a prior investigation. That investigation was closed long ago, and the return of those documents has recently been requested. Since we have no basis to retain them, we will begin returning them on August 15.

Sincerely yours,

DONALD I. BAKER
Acting Assistant Attorney General
Antitrust Division

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20560

OFFICE OF THE CHAIRMAN

AUG 3 1976

The Honorable Donald I. Baker
Acting Assistant Attorney General
Antitrust Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Baker:

This is in reference to your letter of August 2, 1976, in which you agreed to clear to the Commission a broad investigation of the automobile industry, subject to the conditions specified in your letter. The specified conditions are acceptable to the Federal Trade Commission.

Accordingly, the Commission will initiate the necessary papers for the formalization of this clearance agreement.

Sincerely yours,

CALVIN J. COLLIER
Chairman

Supreme Court, U. S.
FILED
OCT 17 1979
MICHAEL RODAK, JR., CLERK

No. 79-306

In the Supreme Court of the United States

OCTOBER TERM, 1979

AMERICAN MOTORS CORPORATION, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

MICHAEL N. SOHN
General Counsel

W. DENNIS CROSS
Assistant General Counsel

EDWARD F. GLYNN, JR.
Attorney
Federal Trade Commission
Washington, D.C. 20500

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-306

AMERICAN MOTORS CORPORATION, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 601 F. 2d 1329. The opinion and orders of the district court (Pet. App. 22a-32a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1979. The petition for a writ of certiorari was filed on August 25, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

When Congress has prescribed a procedure by which objections to Commission subpoenas can be raised without risk in an enforcement hearing in the district court, and when the Commission has prescribed an

additional procedure under its rules by which objections to subpoenas can be raised prior to enforcement, whether subpoena recipients may bypass these procedures by filing a collateral action for preenforcement review.

STATEMENT

In August 1976 the Federal Trade Commission ("Commission") initiated an investigation into competition in the automobile industry. It adopted a resolution setting forth the purpose of the investigation and authorizing its staff to issue compulsory process (Pet. App. 37a). Pursuant to that resolution, the Commission's staff issued subpoenas duces tecum to petitioners General Motors Corporation, Chrysler Corporation, and American Motors Corporation, as well as Ford Motor Company. The petitioner manufacturers obtained extensions of time for complying with or moving to quash or limit the subpoenas until September 18, 1978, but neither complied with nor filed motions challenging the subpoenas within that time.[1] Rather, on September 11, 1978, they commenced this action seeking declaratory and injunctive relief, including relief enjoining the Commission from enforcing any compulsory process issued pursuant to its resolution.[2] Although the complaint

[1]The Commission previously issued a subpoena duces tecum to Chase Manhattan Corporation seeking records relating to petitioner American Motors Corporation's financial condition and ability to compete in the automobile industry. The date for compliance with, or filing motions addressed to, that subpoena was similarly extended by agreement.

[2]The three petitioner manufacturers were joined as plaintiffs by two General Motors dealers incorporated in Michigan. Ford Motor Company did not join in the action below. Instead, it filed a motion before the Commission seeking to quash or limit the subpoena pursuant to 16 C.F.R. 2.7(b). Its motion raised substantially the same claims raised by petitioners. The Commission's response to Ford's motion is described by the court of appeals (Pet. App. 20a-21a). See also note 5, *infra*.

contains a variety of allegations, its essential claim is that the resolution authorizing the investigation fails adequately to define the investigation's scope and purpose and that the subpoenas issued in the course of the investigation therefore constitute unreasonable searches and seizures in violation of petitioner's Fourth and Fifth Amendment rights (Pet. 12).

The Commission moved to dismiss the complaint, contending that petitioners failed to exhaust their administrative remedies by neglecting to file motions to quash or limit the subpoenas in accordance with the Commission's rules (see 16 C.F.R. 2.7(b)). The Commission also contended that because the subpoenas could be enforced only on application by the Commission to an appropriate district court (see 15 U.S.C. 49), petitioners had an adequate remedy at law and could raise their objections to the subpoenas as defenses in such an enforcement proceeding. The district court denied the Commission's motion to dismiss, and entered an order effectively enjoining the Commission from taking further steps to enforce the subpoenas (Pet. App. 22a-32a). The court of appeals reversed, ordering dismissal of petitioners' complaint. Declining to reach the merits of petitioners' claim, the court emphasized the narrow scope of its ruling (Pet. App. 3a):

> We emphasize that this court has not reached the merits of appellees' claims. This decision is based purely upon the conclusion that appellees have mistaken their remedies, and all issues (including appellees' constitutional claims) sought to be presented for decision to the District Court can and must under the law be presented first to the FTC and, if rejected, may then be litigated under the

applicable statutory provisions in subsequent enforcement proceedings in the Federal District Court prior to presentation to this Court.[3]

ARGUMENT

Petitioners' underlying claim (Pet. 12) is that, because of the breadth of the Commission's investigation, subpoenas issued in the course of the investigation amount to unreasonable searches and seizures in violation of their Fourth and Fifth Amendment rights. The court of appeals correctly declined to pass on the merits of that claim, holding that petitioners had "mistaken their remedies" (Pet. App. 3a) by filing a collateral action instead of moving in the administrative forum to quash the subpoenas and instead of availing themselves of the statutory procedure for objecting to Commission subpoenas in the district court at the time of enforcement.

[3]Although the court of appeals did not reach the merits of petitioners' claims, it noted that "[m]uch water has * * * flowed under many bridges" since this Court handed down its decision in the case on which petitioners placed principal reliance (*FTC* v. *American Tobacco Co.*, 264 U.S. 298 (1924) (a case which applies only to orders for unlimited access to files, not to investigations conducted pursuant to subpoena)). See Pet. App. 2a. It is generally recognized that *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), superseded the broad implications of *American Tobacco*. See 1 K. Davis, *Administrative Law Treatise* §3.01 at 163 (1958). Petitioners' argument that the issuance of administrative subpoenas gives rise to a "seizure" of their records (Pet. 26-27) is also at odds with *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 195 (1946), which observed that administrative subpoenas "present no question of actual search and seizure, but * * * only the question whether orders of court for the production of specified records have been validly made * * *."

These administrative and judicial remedies are still available to petitioners and, as a result of the decision of the court of appeals, they are now pursuing them.[4]

1. The court of appeals' decision that petitioners must exhaust their administrative remedies rests on the established principle that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); see *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 211-214, 217 (1946); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952). The rule requiring exhaustion of administrative remedies before commencing judicial proceedings applies to parties under investigation by the Federal Trade Commission. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 653-654 (1950). Recent decisions have given effect to this doctrine by dismissing preenforcement challenges to Commission investigations. See, *e.g.*, *Casey* v. *FTC*, 578 F. 2d 793, 796-798 (9th Cir. 1978); *General Motors Corp.* v. *FTC*, [1978-1] CCH Trade Cases, para. 62,005 at 74, 291-74,294 (N.D. Ohio 1977).

The exhaustion doctrine was properly applied in the present case. Under Section 2.7(b) of the Commission's rules (16 C.F.R. 2.7(b)), petitioners may file motions with the Commission to quash or limit the subpoenas that they received based on all appropriate objections, including the Commission's purported lack of authority to conduct the investigation, the breadth of the subpoenas, and the

[4]Applications by petitioners for stay of the mandate of the court of appeals pending this Court's disposition of the petition for a writ of certiorari were denied by the court of appeals and by Mr. Justice Stewart sitting as Circuit Justice.

relevance of the information demanded. See, *e.g.*, *United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 652; *FTC* v. *Texaco, Inc.*, 555 F. 2d 862, 871-873 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977); *FTC* v. *Markin*, 391 F. Supp. 865, 869 (W.D. Mich. 1974), aff'd, 532 F. 2d 541 (6th Cir. 1976); *General Motors Corp.* v. *FTC*, *supra*, [1978-1] CCH Trade Cases at 74,294 n.9.

2. Petitioners nonetheless contend (Pet. 19-24) that the Commission's administrative procedures are inadequate. There is no question, however, that all of petitioners' claims may be raised in a motion to quash or limit, and that the Commission has power to grant the relief that they seek.[5] Their argument that the administrative procedure is inadequate rests on the assertion that their claims are based on the Constitution and that, in light of Commission policies and practices, they are not likely to obtain complete relief from the Commission.

Exhaustion is not excused, however, merely because constitutional contentions are raised. In most cases in which a recipient protests the scope of an administrative

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[5]As the Court of appeals noted (Pet. App. 20a), Ford Motor Company, which also was served with a subpoena during the course of the investigation, filed a motion to quash before the Commission. Even though Ford did not obtain from the Commission all the relief it sought, the court of appeals observed that resort to administrative remedies was justified:

> Contrary to convincing us that the administrative and statutory judicial remedies outlined above are inadequate, we feel the Ford result serves to illustrate and helps to justify the requirement of exhaustion of remedies. Plainly, the FTC did listen and act upon Ford's complaints. We have, of course, no way of judging the adequacy of its answer nor of knowing whether our present plaintiffs could present facts which would require a more favorable administrative remedy.

subpoena, it is possible to frame objections in constitutional terms. But framing the challenge in this manner does not dispense with the need for resort to administrative remedies. Indeed, in the leading case of *Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*, this Court required exhaustion of administrative remedies despite the existence of constitutional claims. The Court has required exhaustion even in cases in which the ultimate question raised (the constitutionality of the statute administered by the agency) was beyond the power of the agency to decide. *Weinberger* v. *Salfi*, 422 U.S. 749, 764-765 (1975).

Moreover, the availability of nonconstitutional grounds on which petitioners could obtain all or part of the relief that they seek makes exhaustion particularly appropriate. See, *e.g.*, *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 773-774 (1947); *Montana Chapter of Ass'n of Civilian Technicians, Inc.* v. *Young*, 514 F. 2d 1165, 1167-1168 (9th Cir. 1975); *Sohm* v. *Fowler*, 365 F. 2d 915, 918 (D.C. Cir. 1966); *Writers Guild of America, West, Inc.* v. *FCC*, 423 F. Supp. 1064, 1082-1083 n.21 (C.D. Cal. 1976). See also *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 56 (1974) (the doctrine of ripeness applies to constitutional claims). Petitioners' objections to the Commission's investigation could be resolved entirely on the basis of the alleged failure of the Commission to follow its own rules or to comply with the Federal Trade Commission Act. Alternatively, objections to overbreadth or relevance could be met through modification of the subpoenas. These questions should be presented to the Commission in the first instance and the Commission should be afforded an opportunity to make its determination.

Nor is exhaustion excused by petitioners' concerns that they are unlikely to obtain relief. This Court has held that exhaustion is required even if the agency has previously rejected the claim. *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952). It is sufficient to require exhaustion that there is a possibility that the agency may agree with the claim or, if disagreeing, may provide a definitive explication of its position that will facilitate judicial reivew.[6] As this Court observed in *United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 653-654:

> If respondents had objected to the terms of the order, they would have presented or at least offered to present evidence concerning any records required and the cost of their books, matters which now rest on mere assertions in their briefs. The Commission would have had opportunity to disclaim any inadvertent excesses or to justify their demands in the record. We think these respondents could have obtained any reasonable modifications necessary, but, if not, at least could have made a record that would convince us of the measure of their grievance rather than ask us to assume it.

See also *McKart* v. *United States*, 395 U.S. 185, 193-194 (1969).[7]

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[6]The Commission's expression of views on the propriety of conducting the investigation in the manner in question, and its analysis of its own organic statute and implementing regulations, will serve to assist ultimate judicial review. The agency's views on such questions are entitled to deference under familiar principles. See, *e.g.*, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *United States* v. *Rutherford*, No. 78-605 (June 18, 1979), slip op. 8-10.

[7]The case of *Leedom* v. *Kyne*, 358 U.S. 184, 190-191 (1958), relied on by petitioners, is not in point. In that case, the district court was asked to resolve, on an undisputed factual record, whether the agency had contravened a specific statutory prohibition. The plaintiffs had "no other means" to "protect and enforce" their rights, and the administrative agency had already spoken on the issue raised. Similarly, in *Central Hudson Gas & Electric Corp.* v. *EPA*, 587 F. 2d 549 (2d Cir. 1978), the plaintiffs contended that the agency acted with a complete lack of statutory authority and that exhaustion would prevent them from meeting a statutory deadline. In excusing further resort to the agency, the court noted that it was dealing with "final agency action." *Id.* at 558-560. Moreover, the court reaffirmed the basic principles of exhaustion relied on by the lower court in the present case. *Id.* at 559.

3. Petitioners also contend (Pet. 24-32) that the court of appeals erred in concluding that they should pursue their judicial remedies in the district court in which the subpoenas will ultimately be enforced.[8] However, the court's ruling that petitioners have an adequate remedy in the subpoena enforcement proceeding is in agreement with the decisions of this Court and each of the other courts of appeals to have considered the issue. See *Reisman* v. *Caplin*, 375 U.S. 440, 446-450 (1964); *FTC* v. *Claire Furnace Co.*, 274 U.S. 160, 174-175 (1927); *Casey* v. *FTC*, 578 F. 2d 793, 798-799 (9th Cir. 1978); *Atlantic Richfield Co.* v. *FTC*, 546 F. 2d 646, 649-650 (5th Cir.

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[8]Section 9 of the Federal Trade Commission Act, 15 U.S.C. 49, provides in pertinent part:

"[The] attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered; or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

1977); *First Nat. City Bank* v. *FTC*, 538 F. 2d 937, 938-939 (2d Cir. 1976), aff'g [1975-2] CCH Trade Cases. para. 60,671 (S.D.N.Y. 1975); *Anheuser-Busch, Inc.* v. *FTC*, 359 F. 2d 487, 490 (8th Cir. 1966); *Blue Ribbon Quality Meats, Inc.* v. *FTC*, 560 F. 2d 874 (8th Cir. 1977), aff'g 434 F. Supp. 159, 162 (W.D. Mo. 1976); *Beatrice Foods Co.* v. *FTC*, [1966] CCH Trade Cases, para. 71,733 (D.C. Cir. 1966). See also *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 226 (1961); *Parke, Davis & Co.* v. *Califano*, 564 F. 2d 1200, 1205 (6th Cir. 1977); *Chilton Corp.* v. *FTC*, [1979-1] CCH Trade Cases, para 62, 487 (N.D. Tex. 1979); *Brandenfels* v. *Day*, 316 F. 2d 375, 378 (D.C. Cir.), cert. denied, 375 U.S. 824 (1963).[9]

The complete adequacy of the judicial enforcement proceeding to test the validity of the Commission's subpoenas is a compelling reason for declining to entertain petitioners' collateral suit seeking injunctive and declaratory relief. See, *e.g.*, *Casey* v. *FTC*, *supra*; *Atlantic Richfield Co.* v. *FTC*, *supra*, 546 F. 2d at 650; *Anheuser-Busch, Inc.* v. *FTC*, *supra*; see, generally, *Chrysler Corp.* v. *Schlesinger*, 565 F. 2d 1172, 1191-1192 (3d Cir. 1977), vacated on other grounds, No. 77-922 (Apr. 18, 1979). While requests for declaratory or injunctive relief are addressed to the sound discretion of the court (*Abbott*

[9]The Third Circuit decisions relied on by petitioners (Pet. 21, 26) are not to the contrary. *A.O. Smith Corp.* v. *FTC*, 530 F. 2d 515 (3d Cir. 1976), involved "special report" orders issued under Section 6(b) of the Act, 15 U.S.C. 46(b), not subpoenas. As noted by the court of appeals, such orders are quite different from subpoenas because they are enforceable by daily penalties (530 F. 2d 520 n. 2). See 15 U.S.C. 50. *Exxon Corp.* v. *FTC*, 588 F. 2d 895 (3d Cir. 1978), considered challenges to a protective order entered by an administrative law judge. The jurisdictional predicate for the limited form of judicial review permitted in that case was confined to the facts presented (588 F. 2d at 902).

Laboratories v. *Gardner*, 387 U.S. 136, 148 (1967)), such proceedings should not be used for "procedural fencing either to secure delay or to choose a forum." *American Automobile Ins. Co.* v. *Freundt*, 103 F. 2d 613, 617 (7th Cir. 1939). See also 6A *Moore's Federal Practice*, para. 57.08[3] at 57-42 (2d ed. 1979). As stated in the Administrative Procedure Act, 5 U.S.C. 703, the appropriate forum for judicial review "is the special statutory review proceeding relevant to the subject matter in a court specified by statute * * *." Accord, *Katzenbach* v. *McClung*, 379 U.S. 294, 296 (1964) ("even though Rule 57 of the Federal Rules of Civil Procedure permits declaratory relief although another adequate remedy exists, it should not be granted where a special statutory proceeding has been provided"). In short, preenforcement actions such as this have traditionally been rejected because "the remedy specified by Congress works no injustice and suffers no constitutional invalidity [and] * * *provides full opportunity for judicial review before any coercive sanctions may be imposed." *Reisman* v. *Caplin*, *supra*, 375 U.S. at 450. Petitioners have "an adequate remedy at law through FTC enforcement actions and suffer[ ] no undue hardship in being remitted to that remedy." *Atlantic Richfield Co.* v. *FTC*, 546 F. 2d 646, 649 (5th Cir. 1977).[10]

[10]Because petitioners will suffer no prejudice from raising their claims in the context of an enforcement proceeding (*Anheuser-Busch, Inc.* v. *FTC*, *supra*, 359 F. 2d at 490-491), the court of appeals correctly held that petitioners could not demonstrate the immediacy of injury necessary to meet the test of *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967) (Pet. App. 18a-19a). Moreover, there was no question that the action challenged in *Abbott Laboratories* was "final agency action." The only question in that case was whether petitioners could obtain review upon completion of that action or must obtain review only in a later action for penalties. Here, in contrast, there has been no "final agency action"; petitioners are subject to no penalties or other sanctions in advance of judicial subpoena enforcement proceedings.

4. The court of appeals properly rejected petitioners' attempt to avoid these settled principles by shifting their attack from the subpoenas to the Commission resolution authorizing issuance of the subpoenas (Pet. 26-32). Petitioners can show no injury from the adoption of a Commission resolution, an action which merely authorizes the Commission's staff to use the Commission's powers of compulsory process under Sections 6 and 9 of the Federal Trade Commission Act, 15 U.S.C. 46 and 49; see 16 C.F.R. 2.7(a). The alleged harms of which petitioners complain relate to the Commission's use of its subpoena power, not to the adoption of the resolution as such.

A resolution issued in a Commission investigation authorizes the staff to use compulsory process and provides the recipient of a subpoena with notice of the nature and scope of the investigation.[11] See *FTC* v. *Texaco, Inc.*, *supra*, 555 F. 2d at 873-874. But a resolution, without more, has no impact on anyone outside of the Commission. For this reason, the Commission's decision to commence an investigation does not constitute final agency action subject to judicial review. See *In re FTC Corporate Patterns Report Litigation*, 432 F. Supp. 291, 303 (D.D.C. 1977), aff'd, 595 F. 2d 685 (D.C. Cir.), cert. denied, No. 78-168 (Nov. 6, 1978); *Brandenfels* v. *Day*, 316 F. 2d 375, 378 (D.C. Cir.), cert. denied, 375 U.S. 824 (1963); see also *Gifford-Hill & Co.* v. *FTC*, 523 F. 2d 730, 732 (D.C. Cir. 1975).

Rather than being a final disposition of any aspect of the investigation, the adoption of a resolution is merely a preliminary procedural decision enabling the staff to commence the investigation. No fine, penalty, sanction or

[11]A copy of the resolution is typically attached to the subpoena, as was done in the present case.

other comparable legal consequence flows from the Commission's adoption of a resolution. See *Chicago & S. Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U.S. 103, 112-113 (1948): "administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." Cf. *Southern Ry. Co.* v. *Seaboard Allied Milling Co.*, No. 78-575 (June 11, 1979). While petitioners assert potential injury flowing from the possibility of disclosure of confidential information and other similar acts, such disclosures would be separate administrative actions whose legality could be tested in independent proceedings (see, *e.g.*, *Exxon Corp.* v. *FTC*, 588 F. 2d 895 (3d Cir. 1978); *Exxon Corp.* v. *FTC*, 589 F. 2d 582 (D.C. Cir. 1978)).[12] Moreover, the issuance of subpoenas pursuant to the Commission's resolution does not subject petitioners to sanctions for noncompliance because Commission subpoenas are not self-enforcing. See 15 U.S.C. 49; *Anheuser-Busch, Inc.* v. *FTC*, *supra*, 359 F. 2d at 490.

In sum, the complaint is barren of any allegation of injury that flows from the mere adoption of the Commission's resolution.

[12]Petitioners do not contend that disclosures by the Commission are the "final agency action" on which the present suit is based.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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